TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].

No. [redacted]455

THE PROVIDENT LIFE AND TRUST COMPANY AND CATHERINE STEWART WOOD, AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF WILLIAM BREWSTER WOOD, DECEASED,

vs.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND CONRAD MORRIS BRAKER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Supreme Court of the United States.

OCTOBER TERM, 1913.

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vs.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND CONRAD MORRIS BRAKER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

BILL OF COMPLAINT.

(Filed February 25, 1913.)

IN THE

District Court of the United States,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE PROVIDENT LIFE AND TRUST COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and a citizen of the said State of Pennsylvania, and CATHERINE STEWART WOOD, a citizen of the State of Pennsylvania, as Executors under the last Will and Testament of William Brewster Wood, deceased, also of the City of Philadelphia, State of Pennsylvania, and a late citizen of the said State of Pennsylvania,	In Equity. No. 10-111.
versus	
AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York, and CONRAD MORRIS BRAKER, a citizen of the State of New York.	

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

THE PROVIDENT LIFE AND TRUST COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and a citizen

of the said State of Pennsylvania, and CATHERINE STEWART WOOD, a citizen of the State of Pennsylvania, as Executors under the Last Will and Testament of William Brewster Wood, deceased, also of the City of Philadelphia, State of Pennsylvania, and a late citizen of the said State of Pennsylvania, bring this their Bill of Complaint against AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York, and CONRAD MORRIS BRAKER, a citizen of the State of New York, and thereupon your Orators complain and say:

First.—That your Orator, THE PROVIDENT LIFE AND TRUST COMPANY, is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and is a citizen of the said State of Pennsylvania. That your Oratrix, CATHERINE STEWART WOOD, is a citizen of the State of Pennsylvania. That your Orators aforesaid are executors under the Last Will and Testament of William Brewster Wood, deceased. That the respondent, AUSTIN B. FLETCHER, is Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and is a resident of the City of New York, State of New York, and a citizen of the said State of New York, and that the respondent, Conrad Morris Braker, is a resident of the City of New York, State of New York, and a citizen of the said State of New York.

Second.—That the jurisdiction of this Court depends upon the diverse citizenship of the parties hereto, and the amount in controversy exceeds the sum of Three Thousand Dollars ($3,000).

Third.—That the aforementioned Conrad Braker, Jr., departed this life on the twenty-first day of July, 1890, having first made and published his Last Will and Testament in writing, bearing date the twentieth day of February, 1890, a copy of which is hereunto annexed, marked Exhibit "A" and made a part of this Bill of Complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth. That the said Conrad Braker, Jr., at the time of his decease, was a resident of the City, County and State of New York.

Fourth.—That on the thirteenth day of September, 1890, the said Will was duly admitted to probate by the Surrogate's Court of the County of New York, in the State of New York, and there recorded in Book of Wills, No. 435, at page 383, and following.

That thereupon letters testamentary were issued out of the said Court to Henry J. Braker and Frances J. Braker, as executor and executrix respectively of the said Last Will and Testament; and the said executor and executrix took upon themselves the duty of administering the estate of the said Conrad Braker, Jr., deceased, and received and collected the assets thereof.

Fifth.—That under and pursuant to the propisions of the "Sixteenth" paragraph of the said Last Will and Testament, the whole amount so held in trust for the said Conrad Morris Braker, less the sum of $25,000 was to be paid to the said Conrad Morris Braker when he should attain the age of fifty-five years, to wit, on the twenty-fifth day of February, 1913.

Sixth.—That out of and from the assets of the said estate so received and collected as aforesaid, the

aforementioned executor and executrix paid over to Henry J. Braker all that remained out of the certain "other one-half of all the rest, residue and remainder, both real and personal, wheresoever situated," in trust for the special benefit of Conrad Morris Braker, the son of the aforesaid testator, Conrad Braker, Jr., such payment being made in accordance with the provisions of the "Sixteenth" paragraph of the aforementioned Will of the said testator, and to be held in trust by the said trustee as likewise provided for and directed by the said paragraph of the said Will, such remainder, as your Orators are informed and verily believe, aggregating $120,731.50.

Seventh.—That by an Order and Decree of the said Surrogate's Court of the County of New York, entered the sixteenth day of November, 1897, Austin B. Fletcher, defendant herein, was appointed as Testamentary Trustee for Conrad Morris Braker under the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased, to succeed the said Henry J. Braker, and to execute the unexecuted trusts of which the said Henry J. Braker was trustee under the said Will, and then and there received, and now holds, said trust fund.

Eighth.—That the said Conrad Morris Braker attained the age of fifty-five years on the 25th day of February, 1913, and he or his assigns then and there became entitled to receive and have paid to him, or them, the said one-half of the residuary estate, amounting, as your Orators are informed and verily believe, to the sum of $120,731.50, which said sum has been held in trust for him as aforesaid under the "Sixteenth" paragraph of the said Will.

Ninth.—That on the 25th day of February, 1902, and by a certain instrument in writing bearing date of that day, the said Conrad Morris Braker sold and assigned to the New York Finance Company, a corporation duly incorporated and existing under the laws of the State of New York, all the "estate, right, title and interest of any kind, form or description whatsoever to the amount or extent of Thirty-five Thousand Dollars ($35,000) and no more of, in and to the legacy of Fifty Thousand Dollars ($50,000), and also in and to the legacy of the part or share of the residuary estate" to which the said Conrad Morris Braker was entitled under and by virtue of the "Fifteenth" and "Sixteenth" paragraphs of the said Last Will and Testament of Conrad Braker, Jr., deceased, subject only to the payment of the sum of seven-tenths of the legacy of $50,000, payable under the "Fifteenth" paragraph of the said Will theretofore assigned to one Frank L. Rabe, amounting to $35,000. The said assignment was duly recorded in the Office of the Register of the County of New York in Liber 4 of Miscellaneous Instruments, page 231, on the first day of March, 1902; and also further recorded in the Office of the Surrogates of the County of New York in Liber 5 of Conveyances and Mortgages of Interests in Decedents' Estates, page 54, on the tenth day of February, 1908. A copy of the said assignment is hereunto annexed, marked Exhibit "B" and made a part of this Bill of Complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth.

Tenth.—That on the fifth day of March, 1902, the said New York Finance Company did make and deliver unto William Brewster Wood its certain Prom-

issory Note bearing date also of that day, and providing for the payment of the said sum of Fifteen Thousand Dollars ($15,000). Thereafter, to wit, on the fifth day of July, 1903, the said New York Finance Company did make, execute and deliver in renewal of the said Note its certain Note for $15,000 bearing date on the same day. That said Note bore interest at the rate of Six per cent. from the date thereof. A copy of the said Promissory Note is hereunto annexed, marked Exhibit "C" and made a part of this bill of Complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth.

Eleventh.—That on or about the fifth day of March, 1902, the said New York Finance Company, as collateral security for the payment of the said Note, and for any renewal or renewals thereof, sold, transferred, assigned and set over to the said William Brewster Wood all its right, title and interest of any kind, form or description which the said New York Finance Company had in the "Sixteenth" paragraph of the said Last Will and Testament of Conrad Braker, Jr., deceased, by virtue of the aforesaid assignment made by the said Conrad Morris Braker to the New York Finance Company, bearing date February 25th, 1902, and attached hereto as Exhibit "B." A copy of the said assignment is hereunto annexed, marked Exhibit "D" and made a part of this Bill of Complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth. The said assignment was duly recorded in the Office of the Register of the County of New York in Liber 6 of Miscellaneous Instruments, page 390, on the 14th day of October, 1907, and was also further recorded in the Office of the Surrogates of the County of New York in

Liber 5 of Conveyances and Mortgages of Interests in Decedents' Estates, page 51, on the 10th day of February, 1908.

Twelfth.—That on or about the Fourteenth day of May, 1912, and by a certain instrument in writing bearing date of that day, the said New York Finance Company sold, transferred, set over and assigned to Catherine Stewart Wood and The Provident Life and Trust Company, of Philadelphia, executors under the Last Will and Testament of William Brewster Wood, all their right, title and interest in and to the right, title and interest which it, the said New York Finance Company, had in and to the certain residuary estate to which the said Conrad Morris Braker was entitled under the provisions of the "Sixteenth" paragraph of the said Last Will and Testament of Conrad Braker, Jr., deceased. A copy of the said Assignment is hereunto annexed, marked Exhibit "E" and made a part of this Bill of Complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth. The said assignment was duly recorded in the Office of the Register of the County of New York in Liber 2 of Decedents' Estates, page 45, on the 22nd day of May, 1912, and was further recorded in the Office of the Surrogates of the County of New York in Liber 11 of Conveyances and Mortgages of Interests in Decedents' Estates, page 302, on the First day of June, 1912.

Thirteenth.—Your Orators further show that on the Twenty-fifth day of February, 1913, your Orators made demand upon the respondent, Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker,

Jr., deceased, for the payment to your Orators of the said Twenty Thousand Dollars ($20,000) payable under the "Sixteenth" paragraph of the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased; that said demand was made upon William P. S. Melvin, attorney for the respondent, Austin B. Fletcher, the said William P. S. Melvin having stated that the respondent Austin B. Fletcher was absent from the State of New York, and the said demand was also made upon Safford A. Crummey, the person in charge of the office of said respondent; that the respondent, Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker as aforesaid did then and there neglect and refuse to pay over to your Orators the said Twenty Thousand Dollars ($20,000) payable under the "Sixteenth" paragraph of the aforesaid Last Will and Testament of Conrad Braker, Jr., deceased; that before the making of the aforesaid demand, the said respondent had notified complainants that he would resist the payment to them of the amount now claimed by them.

Fourteenth.—Your orators further show that the assignment of the said Conrad Morris Braker to the said New York Finance Company, attached hereto as Exhibit "B," was and is an absolute sale of Twenty Thousand Dollars ($20,000) payable under the "Sixteenth" paragraph of the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased, and that by said assignment and the several mesne assignments hereinabove recited, an absolute title was and is vested in your Orators in and to the aforesaid Twenty Thousand Dollars ($20,000) payable under the "Sixteenth" paragraph of the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased.

Fifteenth.—Your Orators further show that Conrad Morris Braker now pretends and alleges that said assignment was in effect security for a usurious loan, and is therefore null and void. Your Orators are advised that the said Conrad Morris Braker is not a necessary party, but is a proper party defendant herein, and your Orators are further advised, allege, and aver, first, that the said assignment was in fact and in law an absolute sale; second, that the said Conrad Morris Braker is precluded by the Statute of Limitations of the State of New York from any and all attempt to set aside the said assignment because the said assignment and the transaction relating thereto was entered into and concluded on or about the Twenty-fifth day of February, 1902, a period of more than three years, and a period of more than ten years prior to this date, and that no action has ever been begun by the said Conrad Moris Braker to set aside, or have declared void, the aforesaid assignment. That any action by the said Conrad Morris Braker is therefore barred by the Third paragraph of Section Three Hundred and Eighthy-three, and by Section Three Hundred and Eighty-eight of the Code of Civil Procedure of the State of New York.

Sixteenth.—Your Orators are further advised that in accordance with the Constitution and Statutes of the United States they are entitled to have heard and determined by this Court their rights in and to the aforesaid legacy, free from any and all attempts and efforts which may, or shall be made by the respondents herein, or either of them, to evade the jurisdiction of this Honorable Court.

WHEREFORE your Orators need equitable relief, and pay:

(a) That your Orators may be declared entitled to the immediate possession of the said Twenty Thousand Dollars ($20,000) payable under the "Sixteenth" paragraph of the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased.

(b) That your Honorable Court may order and direct that Austin B. Fletcher, as Testamentary Trustee under the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased, shall be ordered and directed to pay to your Orators the said Twenty Thousand Dollars ($20,000).

(c) That your Honorable Court will order, adjudge and decree that the respondent herein, Conrad Morris Braker, has no title to, or right in, the aforementioned Twenty Thousand Dollars ($20,000) which he is entitled in any way to enforce against your Orators.

(d) That your Honorable Court will grant an Injunction prohibiting and restraining the respondents herein, and each of them, from litigating, or attempting to litigate in any other Court the controversy and issues raised herein.

(e) That your Orators may have such further and general relief in the premises, as the nature of the case may require, and shall be agreeable to equity and good conscience.

(f) And your Orators further pray that your Honoable Court may issue a writ of subpoena to the defendants above-named, Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and Conrad Morris Braker, thereby commanding them, and each of them, at a certain time and

under a certain penalty therein to be limited, personally to appear before your Honorable Court, and then and there full, true and perfect answer make, but not under oath, answer under oath being hereby expressly waived, to all and singular the premises, and further to stand to, perform and abide by such further order or direction or decree herein as to your Honorable Court may seem meet.

And your Orators will ever pray.

MILLER, KING, LANE & TRAFFORD,
PERRY D. TRAFFORD,
Solicitors for Complainant.

DICKSON, BEITLER & McCOUCH,
PERRY D. TRAFFORD,
Of Counsel.

EXHIBIT "A."

In the Name of God, Amen.

I, Conrad Braker, Jr., of the City, County and State of New York, being of sound mind and memory and knowing the uncertainty of this mortal life, do make, publish and declare this to be my Last Will and Testament, herby revoking and annulling all wills by me heretofore made, in manner and form following, that is to say:

First.—I direct that all my just debts and funeral expenses be paid as soon as convenient.

Second.—I give, devise an bequeath to my beloved wife, Frances J. Braker, the sum of One Hundred and twenty-five thousand dollars ($125,000) and I direct that the same shall be and belong to her absolutely and

free from any restrictions of whatsoever nature, and I further direct that the same shall be paid to her within eighteen months after my decease, with interest at the rate of five (5) per centum per annum, payable quarterly upon the amount paid until the entire sum is paid.

It is my desire and I so direct that the above bequest shall have priority over any and all other bequests made in this my Last Will and Testament, and if not paid immediately upon my decease, I direct that such reasonable security as she may desire shall be given her for its payment within the time specified.

And I further give, devise and bequeath unto my said wife, all my furniture, pictures, plate, jewelry, ornaments, horses, carriages, wagons and harness, and I direct that the above provisions made for her shall be received in lieu of dower.

Third.—I give devise and bequeath to my son Henry J. Braker, his heirs and assigns, all my real and personal property of whatsoever nature or description situated in Hamilton Township, McKean County, State of Pennsylvania, consisting of Warrant No. 4912 and containing about ten hundred and fifty acres (1050); also my mill property at New Brooklyn, (now called South Plainfield) New Jersey. The same to be and belong to him absolutely and at his disposal.

And I further direct that should any of the property mentioned in this section be sold or otherwise disposed of previous to my death, that within twelve months after my decease my said son, Henry J. Braker, shall in its place receive the amount obtained for the same.

Fourth.—I give, devise and bequeath unto my son, Conrad Morris Braker, his heirs and assigns, my prop-

erty in Nyack-on-the-Hudson, State of New York, the same being situated on Broadway in the said City and consisting of about two (2) acres of land; also my property in Township No. 41 Jefferson County, State of Missouri, consisting of about 120 (one hundred and twenty acres). Also my interest in about ninety-six acres of land, known as Disbrough Farm and situated in Millstone, Hilborough Township, Somerset County, New Jersey, my interest in the same being sixty-five per cent. (65%). Also my lot consisting of about two acres in New Brooklyn, New Jersey; the same being distinct and apart from the property in said New Brooklyn given to my son Henry J. Braker, the same to be and belong to him absolutely and at his disposal.

And I further direct that should any of the property mentioned in this section be sold or otherwise disposed of previous to my death, that within twelve months after my decease my said son, Conrad Morris Braker, shall in its place receive the amount obtained for the same.

Fifth.—I give, devise and bequeath unto my sister, Mrs. Louise Eckart, to have and to hold to her, her heirs, executors, administrators and assigns forever the sum of Twenty Thousand ($20,000) Dollars, the same to be paid to her within two years after my decease with interest at the rate of Five (5) per centum, to be paid quarterly upon the amount remaining unpaid, until the entire sum is paid.

Sixth.—I give, devise and bequeath unto my brother, George Braker to have and to hold to him, his heirs, executors, administrators and assigns forever the sum of Twenty Thousand ($20,000) Dollars, the same to be paid to him within two years after my decease, with interest at the rate of Five (5) per centum

per annum, to be paid quarterly upon the amount remaining unpaid until the entire sum is paid.

Seventh.—I give, devise and bequeath unto my brother, John Henry Braker, to have and to hold to him, his heirs, executors, administrators, and assigns forever the sum of Fifteen Thousand ($15,000) Dollars, and I direct that the same shall be paid to him within two years after my decease with interest payable quarterly upon the amount remaining unpaid at the rate of five (5) per centum per annum until the entire sum be paid.

Eighth.—I give, devise and bequeath to Mrs. Charles E. Morris, now of the City of Brooklyn, State of New York, the sum of One Thousand ($1,000) Dollars, the same to be and belong to her, without restriction, and I direct that the said sum shall be paid to her within One Year from my decease.

Ninth.—I give, devise and bequeath to my friend, William D. Faris, now of the City of Brooklyn, State of New York, the sum of One Thousand ($1,000) Dollars, the same to be and belong to him absolutely and without restriction, and I direct that the said sum be paid to him within One Year from my decease.

Tenth.—I give, devise and bequeath to William V. McKenzie, of Rahway, State of New Jersey, the sum of One Thousand ($1,000) Dollars and direct that the same shall be paid to him within One Year from the date of my decease.

Eleventh.—After the above payments have been made as aforesaid and directed, I give, devise and bequeath one-half of the rest, residue and remainder of my estate both real and personal, of whatsoever de-

scription and wheresoever situated to my son, Henry J. Braker, his heirs and assigns, the same to be and belong to him absolutely and without restriction.

Twelfth.—Out of the other one-half (½) of all the rest, residue and remainder of my estate, both real and personal wheresoever situated, I give and bequeath to my son, Conrad Morris Braker, the sum of Thirty Thousand Dollars ($30,000), and I direct that of this sum, Five Thousand Dollars ($5,000) shall be paid to him within sixty (60) days from the date of my decease, and the remaining Twenty-five Thousand Dollars ($25,000) of the above Thirty Thousand Dollars ($30,000), shall be paid to him within six months from the date of my decease, and until the above amounts are paid to him, I direct that he shall receive interest on the same at the rate of five (5) per centum per annum.

Thirteenth.—Out of the above said other one-half of all the rest, residue and remainder of my estate, both real and personal, wheresoever situated, I give and bequeath to William D. Faris the sum of Twenty Thousand Dollars ($20,000) and I direct that the same shall be paid to him within nineteen months of the date of my decease, and that he shall hold the same in trust for the benefit of my grandchild, Florence May Braker, until she shall attain the age of twenty-one years, which will be May thirtieth, nineteen hundred and five (A. D. 1905) at which time I direct that the said sum together with any accrued and unpaid interest or increase shall be paid to her and be and belong to her absolutely. But I further direct that, if it shall appear necessary to the said trustee for the proper maintenance, support or education of my said grandchild, the interest or increase derived from this

bequest may be used for and applied to the above purposes, and her receipt notwithstanding her infancy, shall be an effectual discharge for the same but the principal shall remain intact until May thirtieth, nineteen hundred and five (A. D. 1905) if she shall live until that date. In the event of the death of my said grandchild, Florence May Braker, before she attains the age of twenty-one years, I direct that the principal and any accrued and unpaid interest or increase shall be paid to my son, Conrad Morris Braker, within six months of the date of her decease, if he be then living, if he shall not be living at the date of the death of my said grandchild, Florence May Braker, I direct that the said bequest shall revert to my residuary estate.

Fourteenth.—Out of the above said other one-half of all the rest, residue and remainder of my estate, both real and personal wherever situated, I give and bequeath to Henry J. Braker the sum of Fifty Thousand Dollars ($50,000), and I direct that the same shall be paid to him within nineteen months from the date of my decease, and that he shall hold the same In Trust and securely invested for the special benefit of my son, Conrad Morris Braker, and I direct that the interest or increase on the same or on such an amount as shall be unpaid as hereinafter set forth, shall be paid to him quarterly so long as he shall live, but I further direct that if he be living at the expiration of ten years from the date of my decease that the said trustee shall pay to my said son, Conrad Morris Braker, the sum of Twenty Thousand Dollars ($20,000) of said principal together with any accrued and unpaid interest should there be any, and the same shall be and belong to him absolutely.

Should my said son be living at the expiration of fifteen years from the date of my decease, I direct that he shall be paid the further sum of Twenty Thousand Dollars ($20,000), together with any accrued and unpaid interest on the said remaining Thirty Thousand Dollars ($30,000) and the same shall be and belong to him absolutely.

Should my said son be living at the expiration of twenty years from the date of my decease, I direct that the remaining Ten Thousand Dollars ($10,000) of the above mentioned sum, together with any accrued and unpaid interest on the said remaining Ten Thousand Dollars ($10,000) shall be paid to him and the same shall be and belong to him absolutely.

Fifteenth.—Out of the said other one-half of all the rest, residue and remainder of my estate, both real and personal wheresoever situated, I give and bequeath to my son Henry J. Braker, the further sum of Fifty Thousand Dollars ($50,000), and I direct that the same shall be paid to him within three years from the date of my decease, and that he shall hold the same in trust and securely invest it for the benefit of my said son, Conrad Morris Braker, paying him the interest derived from the same semi-annually from the date of my decease until he shall attain the age of fifty-five years, when I direct that the principal and any unpaid interest shall be paid to him and belong to him absolutely.

In the event of the death of my said son, Conrad Morris Braker, before he attains the age of fifty-five years, I direct that the income derived from the said Fifty Thousand Dollars ($50,000) shall be paid semi-annually to Florence L. Braker, wife of my said son, Conrad Morris Braker, so long as she shall live and remains unmarried; in the event of her marriage or

death, I direct that the said Fifty Thousand Dollars ($50,000) shall be given to my grandchild, Florence May Braker if she then be living, and if she be not living then the said Fifty Thousand Dollars ($50,000) shall be paid to my son Henry J. Braker if he be living, if he be dead, I direct that it sink into my residuary estate.

Sixteenth.—I direct that all that remains out of the above said "other one-half of all, the rest, residue and remainder, both real and personal, wheresoever situated," after the bequests made in sections Twelfth, Thirteenth, Fourteenth and Fifteenth shall have been provided for, shall be held in trust by my wife, Frances J. Braker, and my son, Henry J. Braker, and their duly appointed successors, for the benefit of my said son, Conrad Morris Braker, until he shall attain the age of Fifty-five years, and I direct that the interest derived from said trust shall be paid to him semi-annually, and when he shall have attained the age of fifty-five years, I direct that the whole amount less the sum of Twenty-five thousand Dollars ($25,000) shall be paid and belong to him absolutely.

Seventeenth.—I direct that if my son, Conrad Morris Braker, shall attain the age of fifty-four years that the trustees of the fund referred to in the above section shall purchase with the said twenty-five thousand dollars ($25,000) an annuity for the benefit of my said son from such a Company as they shall deem best and safest.

Eighteenth.—I further direct in the event of the death of my said son, Conrad Morris Braker before he shall have received the bequests made to and for him, and specified in sections Fourth, Twelfth, Fourteenth, Fifteenth and Sixteenth, then said bequests shall pass

absolutely and at once to my son, Henry J. Braker, his executors and assigns, unless otherwise specified in said sections.

Nineteenth.—I further direct that the trustees of any of the above bequests may at any time sell any property or securities held by them and securely reinvest the proceeds as they shall deem best.

Twentieth.—I direct that any one who shall dispute or contest this my Last Will and Testament, shall forfeit one-half (½) of the legacies or benefits, they would otherwise receive under it, and the amount so forfeited shall revert to my residuary estate.

Twenty-first.—I nominate, constitute and appoint my son, Henry J. Braker, and my beloved wife, Frances J. Braker, the executor and executrix of this my Last Will and Testament, and I direct that the survivor shall be empowered to appoint a co-executor and in the event of either dying or failing to serve, it is my Will that another shall be appointed at once and that no one person shall serve alone as my executor or executrix, and I direct that neither my son, Henry J. Braker, or my beloved wife, Frances J. Braker, shall be required to give any bond or bonds for the execution of their duties.

Twenty-second.—I further direct that my son, Henry J. Braker, or my beloved wife, Frances J Braker, in the event of the death of either shall individually be empowered to appoint a co-trustee, wherein they are named as such in this my last Will and Testament.

In Witness Whereof: I, the said Conrad Braker, Jr., have hereunto set my hand and seal this Twentieth day of February, One thousand eight hundred and ninety.

C. BRAKER, Jr.

Signed, sealed, published and declared, by the said testator as and for his last Will and Testament, in the presence of us and each of us, who in his presence, at his request, and in the presence of each other have hereunto subscribed our names as attesting witnesses this Twentieth day of February, One thousand eight hundred and ninety.

Austin L. Fletcher,
Murray Hill Hotel, Park Ave., N. Y. City.

J. Arthur Harratt,
645 Madison Ave., N. Y. City.

G. Olney Blott,
114 West 49th St., N. Y. City.

EXHIBIT "B."

Whereas Conrad Braker, Jr., late of the City, County and State of New York, departed this life on or about the 21st day of July, 1890, having first made and published his Last Will and Testament in writing, bearing date of the 20th day of February, A. D. 1890; and which said Will was thereafter duly admitted to probate by the Surrogate of the County of New York and recorded in his office in Liber 435 of Wills, page 383, etc., and

Whereas, wherein and whereby the said Will, the said Conrad Braker, Jr., did, inter alia, will as follows:

Fifteenth.—"Out of the said other one-half of all the rest, residue and remainder of my estate, both real and personal, wheresoever situated, I give and bequeath to my son, Henry J. Braker the further sum of

Fifty Thousand ($50,000) Dollars and I direct that the same shall be paid to him within three years from the date of my decease, and that he shall hold the same in trust and securely invest it for the benefit of my said son CONRAD MORRIS BRAKER, paying him the interest derived from the same semi-annually from the date of my decease until he shall attain the age of fifty-five years, when I direct that the principal and any unpaid interest shall be paid to him and belong to him absolutely.

"In the event of the death of my said son, CONRAD MORRIS BRAKER before he attains the age of fifty-five years, I direct that the income derived from the said Fifty Thousand ($50,000) Dollars shall be paid semi-annually to FLORENCE L. BRAKER, wife of my said son, CONRAD MORRIS BRAKER, so long as she shall live and remains unmarried. In the event of her marriage or death, I direct that the said Fifty Thousand ($50,000) Dollars shall be given to my grandchild, FLORENCE MAY BRAKER if she then be living, and if she be not living, then the said Fifty Thousand ($50,000) Dollars shall be paid to my son, HENRY J. BRAKER, if he should be living, if he be dead, I direct that it sink into my residuary estate."

Sixteenth.—I direct that all that remains out of the above said "other one-half of all the rest, residue and remainder, both real and personal wheresoever situated," after the bequests made in sections twelfth, thirteenth, fourteenth and fifteenth shall have been provided for, shall be held IN TRUST by my wife, FRANCES J. BRAKER, and my son, HENRY J. BRAKER, and their duly appointed successors for the benefit of my said son, CONRAD MORRIS BRAKER, until he shall attain the age of fifty-five years, and I direct that the

interest derived from said Trust shall be paid to him semi-annually and when he shall have attained the age of fifty-five years, I direct that the whole amount less the sum of Twenty-five Thousand ($25,000) Dollars shall be paid and belong to him absolutely."

WHEREAS, by an Order and Decree of the Surrogates' Court, New York County, entered the Sixteenth day of November, A. D. 1897, AUSTIN B. FLETCHER was appointed as Testamentary Trustee for the said CONRAD MORRIS BRAKER under the aforementioned Last Will and Testament of CONRAD BRAKER, JR., deceased, to succeed the said HENRY J. BRAKER, and to execute the unexecuted Trusts of which HENRY J. BRAKER was Trustee, under the above recited Last Will and Testament; and

WHEREAS by the certain account rendered by the said AUSTIN B. FLETCHER of his proceedings as such Testamentary Trustee of the said CONRAD MORRIS BRAKER to October 1st, 1900, and filed in the Surrogates' Court, New York County, IT IS SHOWN that the Fifty Thousand ($50,000) Dollars mentioned and provided for in the "Fifteenth" paragraph of the aforesaid Will has been duly invested as by the said Will provided for; and that the further sum of One hundred and twenty-one Thousand, eight hundred and ten Dollars and 88/100 ($121,810.88) has been invested with the exception of a small portion thereof, for the use and benefit of the said CONRAD MORRIS BRAKER as is provided for in the "Sixteenth" paragraph of the said Will; and

WHEREAS by a certain instrument in writing, bearing date of April 18th, 1901, the said CONRAD MORRIS BRAKER assigned to one FRANK L. RABE a certain seven-tenths part of the legacy of Fifty Thousand

($50,000) Dollars coming to the said CONRAD MORRIS BRAKER under the aforementioned "Fifteenth" clause of the said Will, to wit, the sum of Thirty-five Thousand ($35,000) Dollars; and

WHEREAS the said CONRAD MORRIS BRAKER is still living, and has attained the age of forty-four years;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that I, CONRAD MORRIS BRAKER, or Stamford, Fairfield County, State of Connecticut, Son of the above named testator, CONRAD BRAKER, JR., and the devisee named in his Will as hereinbefore more particularly recited, for and in consideration of the sum of One Dollar lawful money of the United States of America to me in hand well and truly paid at and before the sealing and delivery hereof by the NEW YORK FINANCE COMPANY, the receopt of all of which is hereby asknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do hereby grant, bargain, sell, assign, transfer and set over unto the said NEW YORK FINANCE COMPANY any and all my estate, right, title and interest of any kind, form or description whatsoever, to the amount or extent of Thirty-five Thousand ($35,000) Dollars, and no more, of, in and to the legacy of Fifty Thousand ($50,000) Dollars, and also in and to the legacy of the part or share of the residuary estate to which I am entitled under and by virtue of the "Fifteenth" and "Sixteenth" paragraphs respectively of the said Last Will and Testament of the said CONRAD BRAKER, JR., deceased, as hereinbefore recited; TO HAVE AND TO HOLD the same unto the said NEW YORK FINANCE COMPANY, its successors and assigns to and for its and their own proper use and benefit forever, and subject only to the payment of the aforementioned sum of Thirty-five thousand ($35,000) Dollars to

ough or Manhattan, City of New York, the sum of Fifteen Thousand ($15,000) Dollars, together with interest thereon at the rate of six per cent. per annum, payable semi-annually, having pledged herewith as collateral security all its right, title and interest in and to the estate of CONRAD BRAKER, JR., deceased, as by the certain Assignment bearing even date herewith will more fully and at large appear.

And upon the non-performance of this promise, or upon default in the payment of any interest on the said loan for the space of fifteen days after the same shall become due and payable, it hereby authorizes and empowers the holder of this note to sell any and all the right, title and interest of the said NEW YORK FINANCE COMPANY in and to the aforementioned estate of CONRAD BRAKER, JR., deceased, as is particularly described in the aforementioned Assignment, such sale to be made in the form and manner provided by law; and to apply the proceeds, or so much thereof as may be necessary to the payment of this note, and of all necessary legal, or other costs and expenses, including counsel fees and other charges connected with the collection hereof, and the sale and delivery of the said interest, holding the said NEW YORK FINANCE COMPANY responsible for any deficiency, which it hereby undertakes and agrees to pay, and accounting to the said NEW YORK FINANCE COMPANY for the surplus, if any.

NEW YORK FINANCE COMPANY,
By (Signed) ARTHUR W. DEPUE,
Pres.

EXHIBIT "D."

Whereas, heretofore, by a certain instrument in writing, bearing date of February 25th, 1902, one Conrad Morris Braker did grant, bargain, sell, assign, transfer and set over to the New York Finance Company, inter alia, any and all his estate, right, title and interest of any kind, form or description whatsoever to the amount or extent of Twenty Thousand ($20,000) Dollars, of, in and to the certain legacy coming to him under and by virtue of the "Sixteenth" paragraph of the Last Will and Testament of Conrad Braker, Jr., deceased, as is by the said Assignment more particularly provided for;

Now, Therefore, Know All Men By These Presents, that the New York Finance Company, a Corporation organized and existing under and by virtue of the Laws of the State of New York, for and in consideration of the sum of Fifteen Thousand ($15,000) Dollars to it in hand well and truly paid at and before the sealing and delivery hereof by William Brewster Wood, receipt of all of which is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do hereby grant, bargain, sell, assign, transfer and set over unto the said William Brewster Wood, his heirs, executors, administrators and assigns, any and all of the Estate, right, title and interest of any kind, form or description whatsoever, which the said New York Finance Company now has or hereafter may have in said Estate of Conrad Braker, Jr., deceased, by virtue of the hereinbefore mentioned Assignment; To Have and to Hold the same unto the said William Brewster Wood, his heirs, executors, administrators and assigns to

and for his own use and benefit forever, provided, however, that if the said NEW YORK FINANCE COMPANY shall well and truly pay or cause to be paid to the said WILLIAM BREWSTER WOOD, his heirs, executors, administrators and assigns, its certain note given herewith for the sum of Fifteen Thousand ($15,000) Dollars, together with interest at the rate of six per cent. per annum, payable on the 5th day of July, 1908, or any note or notes which may be given in renewal thereof, then this Assignment to be null and void. And the said NEW YORK FINANCE COMPANY does hereby appoint the said WILLIAM BREWSTER WOOD its true and lawful Attorney, irrevocable with full power of substitution of other Attorneys under him, and give and grant to him, his heirs ,executors, administrators and assigns, full power and authority in its name or in the name of its successors or assigns, to ask, demand, sue for, recover and receive the said right, title, interest, legacies and estate hereinbefore mentioned, and particularly set forth, and to compound, acquit, release and discharge the same, hereby ratifying and confirming all and whatever he or they shall lawfully do or cause to be done in or about the premises.

IN WITNESS WHEREOF, the said NEW YORK FINANCE COMPANY has hereunto signed its name, and caused the same to be signed by its President and its corporate seal to be hereunto affixed this 5th day of March, 1902.

NEW YORK FINANCE COMPANY,

ARTHUR W. DEPUE,

(Seal) *President.*

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } *ss.:*

On the 18th day of September, in the Year One Thousand Nine Hundred and three, before me personally came ARTHUR W. DEPUE, to me known, who being by me duly sworn, did depose and say that he resided in the City of New York; that he is the President of the NEW YORK FINANCE COMPANY, the Corporation described in, and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was said corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and he signed his name thereto by like order.

ARTHUR W. DEPUE.

T. LLOYD HOLLISTER,

(Seal) *Notary Public No. 82, Kings County.*

Certificate filed in New York, Queens and Richmond Counties.

Recorded in the Office of the Register of the County of New York, in Liber 6 of Miscellaneous Instruments, page 390, on the 14th day of Oct. A. D. 1907, at 3 o'clock 25 Min. P. M.

Witness my hand and official seal.

FRANK GASS,

(Seal) *Register.*

Recorded in the Office of the Surrogates' of the County of New York, in Liber 5 of Conveyances and Mortgages of interests in Decedents' Estate, page 51, on the 10th day of Feb. A. D. 1908, at 3 o'clock P. M.

Witness my hand and seal of the Court.

DANIEL J. DOWDNEY,

(Seal) *Clerk of the Surrogates' Court.*

EXHIBIT "E."

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, by a certain instrument of writing, bearing date the 25th of February, 1902, one Conrad Morris Braker sold, assigned and transferred to the New York Finance Company, *inter alia,* all his right, title and interest to the amount of Twenty Thousand Dollars ($20,000) in and to a certain legacy coming to him under and by virtue of the Sixteenth paragraph of the Last Will and Testament of Conrad Braker, Jr., deceased;

AND WHEREAS, the New York Finance Company, by a certain instrument of writing, dated the 5th day of March, 1902, assigned to William Brewster Wood, in consideration of the sum of Fifteen Thousand Dollars ($15,000) paid to it by him, all its right, title and interest which the said New York Finance Company then had or thereafter might have in said estate of Conrad Braker, Jr., deceased, by virtue of said above mentioned assignment, to have and to hold the same unto the said William Brewster Wood, his heirs, administrators, executors and assigns, to and for his own use and benefit forever, provided, however, that if the said New York Finance Company shall well and truly pay or cause to be paid to the said William Brewster Wood, his heirs, administrators, executors and assigns its certain note given therewith for the sum of Fifteen Thousand Dollars, together with interest at the rate of Six per cent. (6%) per annum, payable on the Fifth day of July, 1908, or any note or notes which may be given in renewal thereof, then such assignment to be null and void;

AND WHEREAS, the said William Brewster Wood died on the 24th day of April, 1905, having left a Last Will and Testament which was duly probated in the

Register's office of Philadelphia County, State of Pennsylvania, and Letters Testamentary thereon issued to his wife and The Provident Life & Trust Company, the Executors named therein;

And Whereas, there is now due and owing on said note of said New York Finance Company the sum of Fifteen Thousand Dollars, with interest at the rate of Six per cent. per annum from January 5, 1907, making the total amount due as of this date Nineteen Thousand Seven Hundred Twenty-five Dollars ($19,725), so that the equity of the New York Finance Company therein does not exceed Two Hundred and Seventy-five Dollars ($275) at the present time, and as Twenty Thousand Dollars so assigned as collateral security is not payable, under the terms of the will of the said Conrad Braker, Jr., deceased, until the said Conrad Morris Braker attains the age of fifty-five years, which event will not occur before the month of February, 1913, by which time the additional interest accruing on said debt of $15,000 would amount to approximately Seven Hundred and Fifty Dollars ($750) or more than sufficient to absorb any possible equity of the New York Finance Company in said collateral;

And Whereas, the New York Finance Company is indebted to the Estate of William Brewster Wood for a balance of interest due on its certain note, dated the 1st day of December, 1902, for Nine Thousand Five Hundred Dollars ($9,500), payable on the 1st day of December, 1907, but now reduced by proceeds of collateral to the principal sum of Five Hundred Dollars ($500), but leaving a balance of interest due thereon of Nine Hundred Sixty-Four and 67/100 Dollars ($964.67), being interest unpaid from June 1st, 1907, to December 1st, 1909, as well as interest on the said reduced sum of Five Hundred Dollars from December 1st, 1909;

And Whereas, the New York Finance Company has agreed to sell to the Executors of the Estate of William Brewster Wood any equity it might possibly have in the interest assigned by it to said William Brewster Wood in the Estate of Conrad Baker, Jr., to the extent of Twenty Thousand Dollars as collateral for said loan of Fifteen Thousand Dollars with interest, in consideration of being given a credit of One Hundred Dollars ($100) upon the interest due by it on the note last above described.

Now Know Ye, that the New York Finance Company, in consideration of the premises and of One Hundred Dollars ($100) to it in hand paid, receipt whereof is hereby acknowledged, has bargained, sold, assigned, transferred, set over and quit-claimed unto Catherine Stewart Wood and The Provident Life & Trust Company of Philadelphia, Executors of the Will of William Brewster Wood, deceased, all the equity of redemption, right, title and interest whatsoever which the said New York Finance Company now has or might or could have in and to the above described interest of Twenty Thousand Dollars in the Estate of Conrad Braker, Jr., deceased, so assigned by it to William Brewster Wood as collateral security for a debt of Fifteen Thousand Dollars and interest, as above set forth.

In Witness Whereof, the New York Finance Company has caused these presents to be executed by its Treasurer, and the seal of the Company to be hereunto affixed, this Fourteenth day of May, A. D. 1912.

NEW YORK FINANCE COMPANY,

Sealed and delivered in the presence of:

By William E. Fritz, *Treasurer.*

Raymond C. Karge,
George Koppenhoefer, Jr.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.:*

On the 14th day of April, in the year One Thousand Nine Hundred and Twelve (1912), before me personally came William E. Fritz to me known, who being by me duly sworn did depose and say that he is the Treasurer of the New York Finance Company, which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was said corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name thereto by like order.

Sworn and subscribed before me. } WILLIAM E. FRITZ. (Seal)

GEORGE KOPPENHOEFFER, JR.,
(Seal) *Notary Public.*

My commission expires March 10, 1913.

(Affidavit-Notary.)

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.:*

I, Henry F. Walton, Prothonotary of the County of Philadelphia and Clerk of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following Certificate, do CERTIFY that George Koppenhoefer, Jr., Esq., before whom the annexed affidavit was made, was at the time of so doing a Notary Public for the Commonwealth of Pennsylvania, residing in the County of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to

take acknowledgements and proofs of Deeds or Conveyances for lands, tenements, and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe, his signature thereto is genuine, and that said oath or affirmation purports to be taken in all respects as required by the laws of the State of Pennsylvania.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 20th day of May, in the year of our Lord one thousand nine hundred and twelve (1912).

HENRY F. WALTON,
(Seal) *Prothonotary.*

Recorded in the office of the Register of the County of New York in Liber 2 of Decedents' Estates, page 45, on the 22nd day of May, A. D. 1912, at 11 o'clock 20 min. A. M.

Witness my hand and Official Seal.

MAX S. GRIFENHAGEN,
(Seal) *Register Co. N. Y.*

Recorded in the Office of the Surrogates' of the County of New York in Liber 11 of Conveyances and Mortgages of interests in Decedents' Estates, page 302, on the 1st day of June, A. D. 1912, at 11 o'clock A. M.

Witness my hand and seal of the Court.

DANIEL J. DOWDNEY,
(Seal) *Clerk of the Surrogates' Court.*

ANSWER OF DEFENDANT FLETCHER AS TESTAMENTARY TRUSTEE.

(Filed April 24, 1913.)

The above named defendant, Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, under the last Will and testament of Conrad Braker, Jr., deceased, separately and for himself answering the Bill of Complaint herein:

I. Admits the averments contained in the several paragraphs of the bill numbered "third," "fourth," "fifth," "sixth," and "seventh," and so much of the averments in the paragraph "first" as states that this defendant is testamentary trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, and that he is a resident of the City of New York, State of New York, and a citizen of the State of New York, and that the respondent Conrad Morris Braker is a resident of the City of New York, State of New York, and a citizen of the State of New York, and defendant admits the averments of the "eighth" paragraph, excepting, however: that this defendant has no knowledge of the assignments alleged to have been made by the "ninth" and "twelfth" paragraphs of said bill.

II. This defendant is without knowledge of the averments of fact contained in the several paragraphs of the bill numbered "ninth," "tenth," "eleventh," "twelfth," "fourteenth," and "fifteenth" and "sixteenth," and is also without knowledge that the plaintiff, the Provident Life and Trust Company, is a corporation organized under the laws of the State of Pennsylvania; or that the plaintiff, Catherine Stewart Wood is a citizen of the State of Pennsylvania. This defendant further answering is without knowl-

edge that the plaintiffs assumed to make demand upon him, as trustee, as aforesaid, in the manner averred in said bill (paragraph "thirteenth'), namely, by demanding from William P. S. Melvin, and also from Safford A. Crummey, payment of the Twenty Thousand Dollars claimed by them. And defendant avers that neither of said individuals had authority to receive or to reject such demand.

III. And for a second defense this defendant avers that upon the face of the bill it is insufficient of fact to constitute a valid cause of action.

IV. And for a third defense this defendant avers that upon the face of the bill the plaintiffs have a plain, adequate and complete remedy at law.

V. And for a fourth defense this defendant avers that upon the face of the bill this court has not cognizance of this suit.

WILLIAM P. S. MELVIN,
Solicitor for Defendant, Austin B. Fletcher,
165 Broadway, New York City, N. Y.

ANSWER OF DEFENDANT BRAKER.

(Filed May 20, 1913.)

The respondent, Conrad Morris Braker, in answer to the bill of complaint herein:

First.—Alleges that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph marked "First" of the bill of complaint, except the allegation which the respondent admits, namely, that the respondent, Austin B. Fletcher, is Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and is a resident of the

City and State of New York, and a citizen of the State of New York, and that the respondent, Conrad Morris Braker is a resident of the City and State of New York, and and a citizen of the State of New York.

Second.—Denies the allegations contained in paragraph marked "Second" of the bill of complaint, except that the respondent admits that the amount in controversy exceeds the sum of Three Thousand Dollars ($3,000.00).

Third.—Admits the allegations contained in paragraph marked "Third" of the bill of complaint.

Fourth.—Admits the allegations contained in paragraph marked "Fourth" of the bill of complaint.

Fifth.—Admits the allegations contained in paragraph marked "Fifth" of the bill of complaint.

Sixth.—Admits the allegations contained in paragraph marked "Sixth" of the bill of complaint.

Seventh.—Admits the allegations contained in paragraph marked "Seventh" of the bill of complaint.

Eighth.—Admits the allegations contained in the paragraph marked "Eighth" of the bill of complaint, except the respondent denies the allegation that respondent's assigns on the 25th day of February, 1913, then and there became entitled to receive and have paid to them the said one-half of the residuary estate.

Ninth.—Denies the allegations contained in paragraph marked "Ninth" of the bill of complaint.

Tenth.—Alleges that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph marked "Tenth" of the bill of complaint.

Eleventh.—Denies the allegations contained in paragraph marked "Eleventh" of the bill of complaint.

Twelfth.—Denies the allegations contained in paragraph marked "Twelfth" of the bill of complaint.

Thirteenth.—Denies the allegations contained in paragraph marked "Thirteenth" of the bill of complaint.

Fourteenth.—Denies the allegations contained in paragraph marked "Fourteenth" of the bill of complaint.

Fifteenth.—Denies the allegations in paragraph marked "Fifteenth" of the bill of complaint, except respondent admits as alleged that Conrad Morris Braker now pretends and alleges that said assignment was in effect security for a usurious loan, and is therefore null and void, and that the said Conrad Morris Braker is a proper party defendant herein.

Sixteenth.—Denies the allegations contained in paragraph marked "Sixteenth" of the bill of complaint.

For a First and Separate Defense.

Seventeenth.—That on July 21st, 1890, Conrad Braker, Jr., the father of the respondent, died at the City of New York, New York, having first made and published his Last Will and testament in writing, bearing date the 20th day of February, 1890, a correct copy of which is annexed to and made a part of the bill of complaint herein, and marked "Exhibit A."

Eighteenth.—That the said will was only admitted to probate on September 13th, 1890, by the Surrogates' Court of the County of New York, in the City of New

York, and recorded at Page 383, in Book of Wills No. 435, and thereupon letters testamentary were issued out of said court to Henry J. Braker, as executor, and Frances J. Braker, as executrix, respectively, who thereupon entered upon the administration of the estate of the said Conrad Braker, Jr., deceased, and received and collected the assets thereof.

Nineteenth.—That under and pursuant to the provisions of the "Sixteenth" paragraph of the said Last Will and Testament, the whole amount held in trust for the respondent, Conrad Morris Braker, less the sum of Twenty-five Thousand ($25,000) Dollars, was to be paid to the respondent, Conrad Morris Braker, when he should attain the age of fifty-five (55) years.

Twentieth.—That out of and from the assets of the said estate so received and collected as aforesaid, the afore-mentioned executor and executrix paid over to Henry J. Braker all that remained out of the certain "other one-half of all the rest, residue and remainder, both real and personal, wheresoever situated," in trust for the special benefit of the respondent, Conrad Morris Braker, such payment being made in accordance with the provisions of the said "Sixteenth" paragraph of the said will, and to be held in trust by the said trustee, as likewise provided for and directed by the said paragraph of the said will.

Twenty-first.—That by an order and decree of the said Surrogates' Court of the County of New York, entered November 16th, 1897, the respondent, Austin B. Fletcher, herein, was appointed as Testamentary Trustee for Conrad Morris Braker, under the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased, to succeed the said Henry J. Braker, and

to execute the unexecuted trusts of which the said Henry J. Braker was Trustee under the said Will, and then and there received and now holds the said trust fund under and pursuant to the provisions of the "Sixteenth" paragraph of the said Will, of which the respondent, Conrad Morris Braker, is the beneficiary as aforesaid.

Twenty-second.—That the respondent, Conrad Morris Braker, attained the age of fifty-five (55) years on the 25th day of February, 1913, and he then became entitled to receive and have paid to him the said one-half of the residuary estate which has been held in trust for him as aforesaid under the "Sixteenth" paragraph of the said Will.

Twenty-third.—That on or about the 14th day of August, 1901, a corporation was organized under the laws of the State of New York, by Charles H. Burr, Arthur W. Depue, William H. Cochran and their associates, under the name of the New York Finance Company, for the purpose of purchasing any and all kinds of real and personal property and the loaning of money thereon; that the certificate of incorporation of said New York Finance Company was filed September 30th, 1901, in the office of the Clerk of New York County.

Twenty-fourth.—That the said Charles H. Burr, Arthur W. Depue, William H. Cochran and their associates commenced the business of loaning money on personal property on or about October 1st, 1901, under the name of the New York Finance Company, and during the year 1902 they were conducting the business of loaning money on personal property under the name of the New York Finance Company, and used said corporate name merely as a cover and cloak for their transactions.

Twenty-fifth.—That on the 25th day of February, 1902, at the City of New York, in the State of New York, the respondent, Conrad Morris Braker, being then a resident of Stamford, in the State of Connecticut, borrowed from the said New York Finance Company, and the said New York Finance Company loaned to the said respondent, the sum of Two Thousand One Hundred and Fifty Dollars ($2,150.00), for a period of eleven (11) years from the date of said loan, namely, February 25th, 1902, to February 25th, 1913; upon which latter date the said loan was to be repaid. That it was then and there agreed between the respondent, Conrad Morris Braker, and the said New York Finance Company that the New York Finance Company should receive from the respondent, Conrad Morris Braker, as a consideration for the said loan for said space of time, in addition to the principal of said loan, the sum of Thirty-two Thousand Eight Hundred and Fifty Dollars ($32,850.00), payable at the maturity of said loan.

Twenty-sixth.—That the interest upon said loan of Two Thousand One Hundred and Fifty Dollars ($2,150.00) for the said period of eleven (11) years, at six per cent. (6%) per annum, the highest amount allowed by law to be paid for the loan or forbearance of money, amounts to one thousand four hundred and nineteen dollars ($1,419.00), and no more.

Twenty-seventh.—That said agreement for said loan and the payment of said interest was made by the said New York Finance Company for the purpose on its part of receiving and taking a greater sum for the loan of said Two Thousand One Hundred and Fifty ($2,150.00) Dollars than at the rate of six per cent. (6%) per annum, and that as a cloak, cover and device to hide and conceal the said excessive, illegal and

usurious rate of interest so exacted from the respondent, Conrad Morris Braker, and agreed to be paid by him to the said New York Finance Company, the said New York Finance Company, in consideration of the making of said loan, at the City of New York, New York, on or about February 25th, 1902, took a certain instrument in writing, bearing date February 25th, 1902, alleged to be an assignment to the New York Finance Company from the respondent, Conrad Morris Braker, which purported to assign all the "estate, right, title and interest of any kind, form or description whatsoever to the amount or extent of Thirty-five Thousand Dollars ($35,000.00), and no more, of, in and to the legacy of Fifty Thousand Dollars ($50,000.00), and also in and to the legacy of the part or share of the residuary estate" to which the said Conrad Morris Braker was entitled, and by virtue of the "Fifteenth" and "Sixteenth" paragraphs of the said Last Will and Testament of Conrad Braker, Jr., deceased, subject only to the payment of the sum of Thirty-five thousand Dollars ($35,000.00) under the "Fifteenth" paragraph of the said Will theretofore assigned to one Frank L. Rabe, a copy of which said alleged assignment is annexed to the bill of complaint herein, made a part thereof and marked "Exhibit B."

Twenty-eighth.—That said contract and agreement of the respondent, Conrad Morris Braker, with the said New York Finance Company pursuant to which said loan of Two Thousand One Hundred and Fifty Dollars ($2,150.00) was made, and the said instrument in writing dated February 25th, 1902, alleged to be an assignment from Conrad Morris Braker to the New York Finance Company, is and are usurious and void, being in violation of Chap. 20 of the Consolidated Laws of the State of New York.

Twenty-ninth.—That by reason of the premises the New York Finance Company acquired no interest in the said legacies bequeathed to the respondent, Conrad Morris Braker, by and under the provisions of the "Fifteenth" and "Sixteenth" paragraphs of the Will of his said father, or in the funds held under said paragraphs in said Will by the respondent, Austin B. Fletcher, as Trustee, in trust for Conrad Morris Braker, as aforesaid, or any part thereof.

Thirtieth.—On information and belief, that on or about March 5th, 1902, without the knowledge of the respondents, the said New York Finance Company executed an instrument in writing, purporting to assign and transfer to William Brewster Wood, the complainants' testator, all its right, title and interest of any kind, form or description which the said New York Finance Company had in the "Fifteenth" and "sixteenth" paragraphs of the said Last Will and Testament of Conrad Braker, Jr., deceased, by virtue of the aforesaid alleged assignment made by the said Conrad Morris Braker, to the said New York Finance Company, bearing date of February 25th, 1902, and attached to the bill of complaint as "Exhibit B," as alleged collateral security for the payment on July 5th, 1908, of a note for Fifteen Thousand Dollars ($15,000.00) alleged to have been given by the said New York Finance Company to William Brewster Wood, together with interest at the rate of six per cent. (6%) per annum, and any note or notes which might be given in renewal thereof.

Thirty-first.—On information and belief, that William Brewster Wood was closely associated in business with those active in the management of the New York Finance Company, and was familiar with

the character of the business transacted by it, and by Charles H. Burr and associates, in the name of the New York Finance Company, and the character of the security offered as collateral to the loan alleged to have been made by him to the New York Finance Company; that he was not a bona fide or innocent purchaser, and did not loan the sum of Fifteen Thousand Dollars ($15,000.00) to the New York Finance Company, or give or pay a valuable consideration for the alleged assignment from the New York Finance Company to him.

Thirty-second.—That before the 25th day of February, 1913, and before the complainants herein demanded from the respondent, Austin B. Fletcher, as Trustee, as aforesaid, the payment of the amount claimed by them, namely, Twenty Thousand Dollars ($20,000.00), under said alleged assignment, the respondent, Conrad Morris Braker, elected to avoid said contract and agreement of loan and said alleged assignment made by him to the New York Finance Company, on February 25th, 1902, on the ground of fraud and usury, and notified the respondent, Austin B. Fletcher, as Trustee as aforesaid, that the respondent, Conrad Morris Braker, objected to the payment to the complainants herein of any part of said trust fund held by the said Trustee under the "Sixteenth" paragraph of the Will of Conrad Braker, Jr., deceased, on account of or by reason of any alleged assignments from the respondent, Conrad Morris Braker, to the New York Finance Company, and from the New York Finance Company to William Brewster Wood, or the complainants herein.

Thirty-third.—That if the alleged assignment from the respondent, Conrad Morris Braker, to the

said New York Finance Company, dated February 25th, 1902, and the alleged assignment from the said New York Finance Company to William Brewster Wood, dated March 5th, 1902, and the alleged assignment from the said New York Finance Company to the complainants herein, dated May 14th, 1912, are declared void, the respondent, Conrad Morris Braker, will be entitled to the sum of Twenty Thousand Dollars ($20,000.00), as a part of the legacy bequeathed to him in, under and by the "Sixteenth" paragraph of the Will of Conrad Braker, Jr., deceased, free from any lien or claim of the complainants herein.

Thirty-fourth.—That the respondent, Conrad Morris Braker, was, on February 25th, 1902, a non-resident of the State of New York, having his residence at Stamford, in the State of Connecticut, and did not become a resident of the State of New York until about the year 1908, and on information and belief, that the said New York Finance Company ceased to do business, and to maintain an office within the State of New York about the year 1908; and all the officers thereof on February 25th, 1902, were, or thereafter and before the year 1908, become non-residents of the State of New York.

For a Second and Separate Defense.

Thirty-fifth.—The respondent, Conrad Morris Braker, repeats the allegations contained in the preceding paragraphs of this answer number 17, 18, 19, 20, 21, 22, 23 and 24, and makes the same a part of his second defense.

Thirty-sixth.—That on the 25th day of February, 1902, at the City of New York, in the State of New York, the respondent, Conrad Morris Braker, being

then a resident of Stamford, in the State of Connecticut, borrowed from the said New York Finance Company, and the said New York Finance Company loaned to the said respondent, the sum of Two Thousand One Hundred and Fifty Dollars ($2,150.00), for a period of eleven (11) years from the date of said loan, namely, February 25th, 1902, to February 25th, 1913; upon which latter date the loan was to be repaid, and the interest accumulated thereon at the rate of six per cent. per annum.

Thirty-seventh.—That the paper dated February 25th, 1902, executed and delivered by Conrad Morris Braker to the New York Finance Company, a copy of which is annexed to the Bill of Complaint and marked "Exhibit B," although absolute on its face and in form, and purporting to sell, assign and transfer to the New York Finance Company, all his estate, right, title and interest of any kind, form or description whatsoever, to the amount or extent of Thirty-five Thousand Dollars ($35,000.00) in and to the legacy of Fifty Thousand Dollars ($50,000.00), and also in and to the legacy or the part or share of the residuary estate to which he was entitled under and by virtue of the "Fifteenth" and "Sixteenth" paragraphs of the Last Will and Testament of Conrad Braker, Jr., deceased, was in truth and in fact, and was intended to be, security for the payment of said loan of Two Thousand One Hundred and Fifty ($2,150.00) Dollars.

Thirty-eighth.—That at the time of the making of said loan of Two Thousand One Hundred and Fifty Dollars ($2,150.00) to the respondent, the said New York Finance Company, through its officers, agents and attorneys, required him to execute said alleged assignment dated February 25th, 1902, as security for the

repayment of said loan and interest on February 25th, 1913, and on or about February 25th, 1902, the respondent, Conrad Morris Braker, executed and delivered a paper to the New York Finance Company, which was represented to him by the said officers, agents and employees of said Finance Company to be in the nature of a security for the repayment of said loan; that the respondent, Conrad Morris Braker, did not read said paper alleged to be an assignment to the New York Finance Company, and dated February 25th, 1903, but the same either was not read to him or, if read to him, it was read to him by one of the officers, agents or attorneys of the said New York Finance Company, and in the reading of it the fact that it was on its face and in form an absolute sale and assignment was suppressed, or the import of said paper signed by the respondent, Conrad Morris Braker, and its legal effect, were not explained to him; that the said respondent was not a lawyer and was not acquainted with or familiar with instruments of the character of this paper or the legal effect thereof, and was not at the time of the signing of the said paper represented by a lawyer; that when the negotiations connected with the making of the said loan of Two Thousand One Hundred and Fifty Dollars ($2,150.00) took place, the said respondent was dealing with the officers, agents and employees of the said New York Finance Company, all of whom were lawyers, and the said respondent relied upon the statements, explanations and representations made by them to him before and at the time he signed said alleged assignment to said New York Finance Company, and supposed and believed and it was represented to him by the said officers, agents and attorneys of the said New York Finance Company that the paper

so signed by him was merely a security for the payment of said loan of Two Thousand One Hundred and Fifty ($2,150.00) Dollars, that the respondent did not learn of the real form and character and legal effect of the said alleged assignment to the said New York Finance Company, dated February 25th, 1902, until shortly before he became fifty-five years of age, namely, February 25th, 1913; that the said respondent had previously before this transaction borrowed from other persons and had received two loans from Charles H. Burr, Arthur W. Depue, William H. Cochran and their associates, giving as security assignments of legacies coming to him under the will of Conrad Braker, Jr., deceased, and the said respondent supposed and believes and was induced by the statements, explanations and representations made to him by the officers, agents and attorneys of the said New York Finance Company to suppose and believe that the paper signed by him on February 25th, 1902, alleged to be an assignment to the New York Finance Company, was of the same nature and form and of the same legal effect as those he had signed in connection with the previous loans.

Thirty-ninth.—That the execution and delivery of the alleged assignment dated February 25th, 1905, described in paragraph "Ninth" of the bill of complaint, a copy of which is thereto annexed as "Exhibit B," by the respondent, Conrad Morris Braker, to the said New York Finance Company, was induced by and made upon the faith of certain statements, explanations and representations made to him by the said New York Finance Company through its officers, agents and attorneys, which said statements, explanations and representations the respondent has since learned were wholly false and fraudulent and were known by the

said officers, agents and attorneys of the said New York Finance Company, at the time they were made, to have been false and fraudulent; that said statements, explanations and representations consisted of statements made to the said respondent that the said paper which he was induced to sign was in form and in effect merely security for the payment of said loan and of the same general character as the papers previously signed by him in connection with two previous loans made to him by Charles H. Burr, Arthur W. Depue, William H. Cochran and associates, and that it was necessary for him to sign said paper in the form aforesaid, in order to secure said loan, all of which statements, explanations and representations were wholly false and fraudulent, as the said respondent has since learned.

That said respondent, Conrad Morris Braker, wholly relying upon the truth of said statements, explanations and representations of the officers, agents and attorneys of the said New York Finance Company, and believing the same to be true, executed and delivered said alleged assignment dated February 25th, 1902.

Fortieth.—That the said statements, explanations and representations and each of them made as aforesaid to said respondent by the said officers, agents and attorneys of the said New York Finance Company were false and fraudulent, and were known to be false and fraudulent by the said officers, agents and attorneys of the said New York Finance Company, at the time they were made; that they were made for the purpose of inducing the execution by the said respondent of the alleged assignment to the said New York Finance Company, dated February 25th, 1902, and that said

alleged assignment was executed and delivered upon the faith of said statements, explanations and representations.

Forty-first.—That all of the said acts of the officers, agents and attorneys of the said New York Finance Company were part of a plan to cheat and defraud the said respondent, Conrad Morris Braker, of his inheritance to the extent of Thirty-five Thousand Dollars ($35,000.00), and to obtain it for their own use, purposes and control, and to deprive said respondent of his right, title and interest therein for the unconscionable small sum of Two Thousand One Hundred and Fifty Dollars ($2,150.00).

Forty-second.—That by reason of the premises the New York Finance Company acquired no interest in the said legacies bequeathed to the respondent, Conrad Morris Braker, by and under the provisions of the "Fifteenth" and "Sixteenth" paragraphs of the Will of his said father, or in the funds held under said paragraphs in said Will by the respondent, Austin B. Fletcher, as Trustee, in trust for Conrad Morris Braker, as aforesaid, or any part thereof.

Forty-third.—On information and belief that on or about March 5th, 1902, without the knowledge of the respondents, the said New York Finance Company executed an instrument in writing, purporting to assign and transfer to William Brewster Wood, the complainants' testator, all its right, title and interest of any kind, form or description which the said New York Finance Company had in the "Fifteenth" and "Sixteenth" paragraphs of the said Last Will and Testament of Conrad Braker, Jr., deceased, by virtue of the aforesaid alleged assignment made by the said

Conrad Morris Braker to the said New York Finance Company, bearing date February 25th, 1902, and attached to the bill of complaint as "Exhibit B," as alleged collateral security for the payment on July 5th, 1908, of a note for Fifteen Thousand Dollars ($15,000.00) alleged to have been given by the said New York Finance Company to William Brewster Wood, together with interest at the rate of six per cent. (6%) per annum, and any note or notes which might be given in renewal thereof.

Forty-fourth.—On information and belief, that William Brewster Wood was closely associated in business with those active in the management of the New York Finance Company, and was familiar with the character of the business transacted by it, and by Charles H. Burr and associates, in the name of the New York Finance Company, and the character of the security offered as collateral to the loan alleged to have been made by him to the New York Finance Company; that he was not a bona fide or innocent purchaser, and did not loan the sum of Fifteen Thousand Dollars ($15,000.00) to the New York Finance Company, or give or pay a valuable consideration for the alleged assignment from the New York Finance Company to him.

Forty-fifth.—On information and belief, that on or about the 14th day of May, 1912, the said New York Finance Company executed and delivered to the complainants herein an alleged assignment which purported to sell, transfer, set over and quit-claim unto the complainants all the equity of redemption, right, title and interest whatsoever which the said New York Finance Company then had or might or could have in and to the above described interest of Twenty Thou-

sand ($20,000.00) Dollars, in the estate of Conrad Braker, Jr., deceased, which had been assigned by it to William Brewster Wood as collateral security for said debt of Fifteen Thousand Dollars ($15,000.00), with interest; that the said alleged assignment was a sham and without consideration, and was made for the apparent purpose of transferring any equity of redemption which was thought then to reside in the New York Finance Company, and upon the ground that the New York Finance Company had failed to pay its note of Fifteen Thousand Dollars ($15,000.00), signed and delivered to William Brewster Wood, as aforesaid; that the said alleged assignment from the said New York Finance Company to complainants was without consideration and void and conferred no title upon complainants; that the complainants were notified prior to the execution of said alleged assignment by the New York Finance Company to the complainants, namely, on or about April 10th, 1912, by an agent or representative of the respondent, Conrad Morris Braker, of the infirmities of the said alleged assignment from Conrad Morris Braker to the New York Finance Company, dated February 25th, 1902, and that the same would be contested by the respondent, Conrad Morris Braker, on account of the usury and fraud in connection with the same; that the said alleged assignment from the said New York Finance Company to the complainants, dated May 14th, 1912, was without consideration and void, and conferred no title upon the complainants; and that the complainants were not bona fide or innocent purchasers without notice of the character of the preceding assignments.

Forty-sixth.—That before the 25th day of February, 1913, and before the complainants herein de-

manded from the respondent, Austin B. Fletcher, as Trustee, as aforesaid, the payment of the amount claimed by them, namely, Twenty Thousand Dollars ($20,000.00) under said alleged assignment, the respondent, Conrad Morris Braker, elected to avoid said contract and agreement of loan and said alleged assignment made by him to the New York Finance Company on February 25th, 1902, on the ground of fraud and usury, and notified the respondent, Austin B. Fletcher, as Trustee, as aforesaid, that the respondent, Conrad Morris Braker, objected to the payment to the complainants herein of any part of said trust fund held by the said Trustee under the "Sixteenth" paragraph of the Will of Conrad Braker, Jr., deceased, on account of or by reason of any alleged assignments from the respondent, Conrad Morris Braker, to the New York Finance Company, and from the New York Finance Company to William Brewster Wood, or the complainants herein.

Forty-seventh.—That if the alleged assignment from the respondent, Conrad Morris Braker, to the said New York Finance Company, dated February 25th, 1902, and the alleged assignment from the said New York Finance Company to William Brewster Wood, dated March 5th, 1902, and the alleged assignment from the said New York Finance Company to the complainants herein, dated May 14th, 1912, are declared void, the respondent, Conrad Morris Braker, will be entitled to the sum of Twenty Thousand Dollars ($20,000.00) as a part of the legacy bequeathed to him in, under and by the "Sixteenth" paragraph of the Will of Conrad Braker, Jr., deceased, free from any lien or claim of the complainants herein.

Forty-eighth.—That the respondent, Conrad Morris Braker, hereby tenders and offers to pay to the complainants herein or to the person or persons whom this Honorable Court shall adjudge to be entitled to receive the same the amount of said loan, namely, Two Thousand One Hundred and Fifty Dollars ($2,150.00), received by him at the time of the signing of said paper, dated February 25th, 1902, alleged to be an assignment to the New York Finance Company, with legal interest thereon from February 25th, 1902, to be computed by this Court, and hereby tenders and offers to pay, and upon the trial of this action will ask leave of this Court to tender and pay to the complainants in this action, or such person or persons as this Court may determine is entitled to receive the same, a part of said sum loaned with interest which shall bear the same ratio to the whole sum loaned, namely, Two Thousand One Hundred and Fifty Dollars ($2,150), as the amount claimed by the complainants, namely, Twenty Thousand Dollars ($20,000), bears to the total amount of the legacies, namely, Thirty-five Thousand Dollars ($35,000) alleged to have been assigned by Conrad Morris Braker to the said New York Finance Company by said alleged assignment dated February 25th, 1902, or, in other words, a sum equivalent to four-sevenths of the amount of said loan of Two Thousand One Hundred and Fifty Dollars ($2,150), and interest.

That this action was commenced on February 25th, 1902, the day said loan of Two Thousand One Hundred and Fifty Dollars ($2,150) became due and payable, and for this reason and because the complainants are non-residents and the New York Finance Company has long since ceased to maintain an office within the State

of New York, the respondent could not sooner make the tender and offer aforesaid.

Forty-ninth.—That the respondent, Conrad Morris Braker, was, on February 25th, 1902, a non-resident of the State of New York, having his residence at Stamford, in the State of Connecticut, and did not become a resident of the State of New York until about the year 1908, and on information and belief, that the said New York Finance Company ceased to do business and to maintain an office within the State of New York about the year 1908; and all the officers thereof, on February 25th, 1902, were, or thereafter and before the year 1908, became non-residents of the State of New York.

For a Third and Separate Defense.

Fiftieth.—That the alleged assignment from the New York Finance Company to William Brewster Wood, dated March 5th, 1902, a copy of which is annexed to the bill of complaint herein and marked "Exhibit D," and the alleged assignment from the New York Finance Company to the complainants herein, dated May 14th, 1912, a copy of which is annexed to the bill of complaint herein and marked "Exhibit E," were not executed, acknowledged and certified according to law, and there was no valuable or adequate consideration for said alleged assignments.

For a Fourth and Separate Defense.

Fifty-first.—That the United States District Court for the Southern District of New York has no jurisdiction of the parties to this action or of the subject matter thereof.

For a Fifth and Separate Defense.

Fifty-second.—On information and belief, that the New York Finance Company, Robert C. Banes, of Philadelphia, Pa., as Trustee of and under the Last Will and Testament of Charles H. Banes, deceased, and Warner J. Banes, deceased, and Joseph Chapman, of Philadelphia, Pa., and Grace A. Jeffords, of Philadelphia, Pa., as Executors of and under the Last Will and Testament of Charles A. Chase, have or claim to have an interest in the estate of Conrad Braker, Jr., deceased, under the alleged assignment, dated February 25th, 1902, from Conrad Morris Braker to the said New York Finance Company, and they are therefore necessary parties to this action.

For a Sixth and Separate Defense.

Fifty-third.—That the bill of complaint herein on its face does not state sufficient facts to constitute a valid cause of action in equity.

Wherefore, the respondent, Conrad Morris Braker, demands judgment:

(1) That said loan of Two Thousand One Hundred and Fifty Dollars ($2,150) was made as the result of a usurious or fraudulent contract, and that the same be adjudged and decreed to be null and void.

(2) That said alleged assignments from Conrad Morris Braker to the New York Finance Company and from the New York Finance Company to William Brewster Wood and to the complainants be adjudged and decreed to be illegal and null and void, and be ordered to be delivered up and cancelled.

Or, in case the Honoroble Court shall refuse to render judgment as heretofore prayed for, then, in that

event, the respondent, Conrad Morris Braker, demands judgment as follows:

(3) That said alleged assignment from Conrad Morris Braker to the New York Finance Company, dated February 25th, 1902, may be adjudged and decreed to be invalid as procured by fraud and to have been and to be a mortgage, and that it was given only as collateral security for the payment of said indebtedness of Two Thousand One Hundred and Fifty Dollars ($2,150), with legal interest thereon, and that said interest may be ascertained and computed by this Court.

(4) That it be adjudged and decreed that William Brewster Wood and the complainants herein were not bona fide purchasers from the New York Finance Company.

(5) That the complainants may be ordered and directed by this Court to receive and accept a sum equal to four-sevenths of the said loan of Two Thousand One Hundred and Fifty Dollars ($2,150), with legal interest thereon from February 25th, 1902, as ascertained and computed by this Court, and that, upon payment of said sum of money into the Court by the respondent, Conrad Morris Braker, the said assignments from Conrad Morris Braker to the New York Finance Company and from the New York Finance Company to William Brewster Wood and the complainants herein, be discharged and cancelled.

(6) That the bill of complaint herein be dismissed with costs, and

(7) That the respondent, Conrad Morris Braker, may have such other and further judgment, order or

relief in the premises as may seem to this Court just and equitable.

Dated New York City, May 19th, 1913.

SAFFORD A. CRUMMEY,
Solicitor for Respondent, Conrad Morris Braker,

Office and P. O. Address, 165 Broadway,
Borough of Manhattan, New York City.

COMPLAINANTS' REPLY TO THE ANSWER OF RESPONDENT, CONRAD MORRIS BRAKER.

(Filed June 10, 1913.)

These plaintiffs, The Provident Life and Trust Company and Catharine Stewart Wood, as Executors of the Last Will and Testament of William Brewster Wood, deceased, repeating and affirming the averments made by them in the Bill of Complaint heretofore filed in this case, in reply to the so-called "Answer" of Conrad Morris Braker herein:

First.—Admit the allegations contained in the paragraph marked "Seventeenth" of said "Answer."

Second.—Admit the allegations contained in the paragraph marked "Eighteenth" of said "Answer."

Third.—Admit the allegations contained in the paragraph marked "Nineteenth" of said "Answer."

Fourth.—Admit the allegations contained in the paragraph marked "Twentieth" of said "Answer."

Fifth.—Admit the allegations contained in the paragraph marked "Twenty-first" of said "Answer."

Sixth.—Deny the allegations contained in the paragraph marked "Twenty-second" of said "An-

swer," except that complainants admit that the said Conrad Morris Braker attained the age of fifty-five years on the 25th day of February, 1913.

Seventh.—Admit that the New York Finance Company was incorporated during the year 1901, as averred in the paragraph marked "Twenty-third" of said "Answer"; that the certificate of incorporation was filed September 30th, 1901, in the office of the Clerk of the County of New York. Complainants have no knowledge or information as to the other allegations of said paragraph marked "Twenty-third" of said answer sufficient to form a belief as to the truth thereof.

Eighth.—Deny the allegations contained in the paragraph marked "Twenty-fourth" in said "Answer," except that complainants admit the New York Finance Company commenced business on or about the first day of October, 1901.

Ninth. — Answering the paragraphs marked "Twenty-fifth," "Twenty-sixth," "Twenty-seventh," "Twenty-eighth" and "Twenty-ninth," in said "Answer," complainants deny each and every allegation contained therein; that no loan of $2150, or any amount whatever, was, on or about the 25th day of February, 1902, made by the said New York Finance Company to Conrad Morris Braker. On the contrary, complainants aver that on the 25th day of February, 1902, Conrad Morris Braker sold absolutely to the said New York Finance Company, his contingent interest in his father's estate, to the extent of Thirty-five Thousand ($35,000) Dollars, as is fully averred and set forth in complainants' Bill.

Tenth.—Admit the allegations contained in the paragraph marked "Thirtieth" of said "Answer," except that complainants deny that they have knowledge or information as to the allegation that the assignment of February 25th, 1902, was without the knowledge of the respondent sufficient to form a belief as to the truth thereof, and ask that if the same be competent, material and relevant, due proof thereof be made.

Eleventh.—Deny the allegations contained in the paragraph marked "Thirty-first" of said "Answer."

Twelfth.—Answering the allegations contained in the paragraph marked "Thirty-second" of said "Answer," deny that they have knowledge or information thereof sufficient to form a belief as to the truth thereof, and are advised by counsel, believe and therefore say that the same are not material, competent and relevant. And complainants allege further that any attempted election by Conrad Morris Braker to avoid the assignment averred in the Bill of Complaint heretofore filed herein, to have been made by him, of the interest bequeathed to him under the "Fifteenth" and "Sixteenth" paragraphs of the will of Conrad Braker, Jr., deceased, are void and of none effect.

Thirteenth.—Answering the allegations contained in the paragraph marked "Thirty-third" of said "Answer," complainants deny that they have knowledge thereof sufficient to form a belief as to the truth thereof, but ask that if the same are material, relevant and competent, due proof thereof be made.

Fourteenth.—Answering the allegations contained in the paragraph marked "Thirty-fourth" of said "Answer," complainants deny that they have knowledge or information thereof sufficient to form a belief as to the truth thereof.

Fifteenth.—In answer to the paragraph marked "Thirty-fifth" in said "Answer," repeat averments contained in preceding paragraphs numbered First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth, and make the same a part of this their reply to the said paragraph numbered "Thirty-fifth" in said "Answer."

Sixteenth.—Deny the allegations contained in the paragraph marked "Thirty-sixth" of said "Answer," except that complainants aver that they have no knowledge or information thereof sufficient to form a belief as to the truth of the allegation that the said respondent, Conrad Morris Braker, was, on the 25th day of February, 1902, a resident of Stamford, in the State of Connecticut.

Seventeenth.—Deny the allegations contained in the paragraph marked "Thirty-seventh" of said "Answer."

Eighteenth.—Deny the allegations contained in the paragraph marked "Thirty-eighth" of said "Answer," except that complainants admit that Conrad Morris Braker is not a lawyer.

Nineteenth.—Deny the allegations contained in the paragraph marked "Thirty-ninth" of said "Answer."

Twentieth.—Deny the allegations contained in the paragraph marked "Fortieth" of said "Answer."

Twenty-first.—Deny the allegations contained in the paragraph marked "Forty-first" of said "Answer."

Twenty-second.—Deny the allegations contained in the paragraph marked "Forty-second" in said "Answer."

Twenty-third.—Admit the allegations contained in the paragraph marked "Forty-third" of said "Answer," except that complainants deny that they have knowledge or information of the allegation that the assignment referred to in the said paragraph was without the knowledge of the said Conrad Morris Braker sufficient to form a belief as to the truth thereof, but ask that if the same be competent, relevant and material, due proof thereof be made.

Twenty-fourth.—Deny the allegations contained in the paragraph marked "Forty-fourth" of said "Answer."

Twenty-fifth.—Deny the allegations contained in the paragraph marked "Forty-fifth" of said "Answer," except that the complainants admit that on or about the 14th day of May, 1912, the New York Finance Company executed and delivered to complainants an assignment of all of the equity of redemption, right, title and interest whatsoever which the said New York Finance Company had in the interest of Twenty Thousand ($20,000) Dollars in the estate of Conrad Braker, Jr., deceased, referred to and mentioned in the said paragraph marked "Forty-fifth" in said "Answer."

Twenty-sixth.—Answering the allegations contained in the paragraph marked "Forty-six" of said "Answer," complainants deny that they have knowledge thereof sufficient to form a belief as to the truth thereof, and are advised by counsel, believe and therefore say that the same are not material, competent and relevant. And complainants further allege that any attempted election by Conrad Morris Braker to avoid the assignment referred to in the Bill of Complaint heretofore filed herein to have been made by him, of the interest bequeathed to him under the "Fifteenth"

and "Sixteenth" paragraphs of the Will of Conrad Braker, Jr., are void and of none effect.

Twenty-seventh.—Answering the allegations contained in paragraph marked "Forty-seventh" of said "Answer," complainants deny that they have knowledge thereof sufficient to form a belief as to the truth thereof, but ask that if the same be material, competent and relevant, due proof thereof be made.

Twenty-eighth.—In answer to the offer and tender of the respondent, Conrad Morris Braker, set forth in the "Forty-eighth" paragraph of said "Answer," complainants aver that said Conrad Morris Braker is now falsely and fraudulently pretending and alleging that the absolute sale and assignment of his interest in the estate of his father, Conrad Braker, Jr., averred to have been sold and assigned by him to the New York Finance Company, as set forth in the above Bill of Complaint, was in effect security for a loan, and is endeavoring to secure the aid of this Court in forcing complainants to deliver this assignment up for cancellation upon repayment of the purchase price or of a part of the purchase price thereof.

Twenty-ninth.—Answering the allegations contained in the paragraph marked "Forty-ninth" of said "Answer," complainants deny that they have knowledge thereof sufficient to form a belief as to the truth thereof, and ask that if the same be relevant, competent and material, due proof thereof be made.

Thirtieth.—Deny the allegations contained in the paragraph marked "Fiftieth" of said "Answer."

Thirty-first.—Complainants aver and show that the "Answer" of the said Conrad Morris Braker attempts to set up a counter-claim or cross-bill, and asks as affirmative relief that (a) the said conveyance and

assignment by the said Conrad Morris Braker to the New York Finance Company dated February 25th, 1902, be annulled and cancelled; or (b) be reformed into a mortgage.

Complainants show to your Honorable Court that it is provided by Section 397 of the Code of Civil Procedure of the State of New York that a cause of action upon which an action cannot be maintained under the Statute of Limitations of the State of New York cannot be effectually interposed as a defense or counter-claim; and that the counter-claim or defenses attempted to be set up by the said Conrad Morris Braker in his said "Answer" constitute alleged causes of action which are barred by the Statute of Limitations of the State of New York as appears from the following facts:

Insofar as the counter-claim or defense or prayer for affirmative relief is based on the ground of the penalty provided by the laws of the State of New York for usury, the said Conrad Morris Braker is barred by the third paragraph of Section 383 and by Section 388 of the Code of Civil Procedure in the State of New York because the aforesaid conveyance and assignment and the transaction relating thereto were concluded on or about the 25th day of February, 1902, a period of more than three years and a period of more than ten years prior to the institution of this action and prior to the filing the the "Answer" or Cross-bill herein; and any and all right of action vested in Conrad Morris Braker to obtain the cancellation of said conveyance or assignment on the ground of usury, even if there ever was any such right of action, which complainants deny, accrued on or about the 25th day of February, 1902, and that no action has ever been begun by the said Conrad Morris Braker to cancel or to have declared void the said assignment.

In so far as the counter-claim or defense or prayer for affirmative relief is based on the ground that the sale of the legacy described in the Bill of Complaint was in reality a mortgage, the said Conrad Morris Braker is barred by the Statute of Limitations of the State of New York, contained in Title II of Chapter 4 of the Code of Civil Procedure of the State of New York, and particularly by Section 388 thereof, because the aforesaid conveyance and assignment and the transaction relating thereto were concluded on or about February 25th, 1902, a period of more than ten years prior to the institution of this suit, and prior to the filing of the "Answer" or Cross-bill herein; and any and all right of action vested in Conrad Morris Braker to reform the said conveyance or assignment on the ground that the same was in realty a mortgage, even if there ever was any such right of action, which the complainants deny, accrued on or about the 25th day of February, 1902, and that no action has ever been begun by the said Conrad Morris Braker to reform the said instrument, or to have the same declared operative as a mortgage.

Thirty-second.—Deny the allegations contained in the paragraph numbered "Fifty-first" of said "Answer."

Thirty-third.—Deny the allegations contained in the paragraph marked "Fifty-second" in said "Answer."

Thirty-fourth.—Deny the allegations contained in the paragraph marked "Fifty-third" of said "Answer."

WHEREFORE, complainants pray that in so far as said "Answer" asks for affirmative relief, the same may be dismissed, and that the relief prayed for in the

Bill heretofore filed in this cause be granted to the complainants.

MILLER, KING, LANE & TRAFFORD,
PERRY D. TRAFFORD,
Solicitors for Complainants.

Office and Post Office Address,
No. 80 Broadway,
Borough of Manhattan,
New York City, N. Y.

DICKSON, BEITLER & McCOUCH,
PERRY D. TRAFFORD,
Of Counsel.

NOTICE OF MOTION OF DEFENDANT, BRAKER, FOR DISMISSAL OF BILL.

(Filed March 27th, 1914.)

SIRS:

PLEASE TAKE NOTICE, that upon all the pleadings and proceedings had herein, I shall move this Court before the judge assigned to hear motions on Friday, the 27th day of March, 1914, at the Post Office Building, Borough of Manhattan, City of New York, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing the bill of complaint herein, with costs.

Dated, March 21, 1914.

Yours, etc.,

SAFFORD A. CRUMMEY,
Solicitor for Respondent,
Conrad Morris Braker.

To Miller, King, Lane & Trafford, solicitors for complainants.

NOTICE OF MOTION BY DEFENDANT, FLETCHER, AS TESTAMENTARY TRUSTEE FOR DECRETAL ORDER OF DISMISSAL.

(Filed March 27th, 1914.)

Gentlemen:

You will please take notice that upon the bill of complaint and the answer herein, a motion will be made before one of the justices of this court, at a term of this court for the hearing or motions, to be held at the court room thereof, No. 66, U. S. General Post Office Building (or such other room as may be designated), in the City of New York, Borough of Manhattan, at 10.30 A. M., on the 27th day of March, 1914, or as soon thereafter as counsel may be heard for a decretal order dismissing this suit with costs against the plaintiffs, on the ground that this court has not cognizance of the suit, or for such other order in the premises as may be just.

Dated, March 2, 1914.

Yours, etc.,

WILLIAM P. S. MELVIN,

Attorney for Defendant,

A. B. Fletcher.

165 Broadway,

New York City, N. Y.

To Miller, King, Lane & Trafford, Esqs., attorneys for plaintiffs.

ORDER DISMISSING SUIT.

(Filed March 27, 1914.)

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the General Post Office Building, in the City and County of New York, on the 27th day of March, 1914.

Present: Hon. E. Henry Lacombe,
Judge.

The Provident Life and Trust Company, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and a citizen of the said State of Pennsylvania, and Catherine Stewart Wood, a citizen of the State of Pennsylvania, as executors under the Last Will and Testament of William Brewster Wood, deceased, also of the City of Philadelphia, State of Pennsylvania, and a late citizen of the said State of Pennsylvania,
Plaintiffs,

against

Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York, and Conrad Morris Braker, a citizen of the State of New York,
Defendants.

Equity 10.
Page 111.

On reading and filing the notice of motion on behalf of the several defendants herein for the dismissal of the suit on the ground that this District Court has

no cognizance of the same in that the suit could not be prosecuted in this Court, if no assignment had been made, the court having considered the bill of complaint and the answers herein on the part of said defendants.

Now, after hearing Mr. William P. S. Melvin, counsel for said defendant, Austin B. Fletcher, as testamentary trustee, etc., and Safford A. Crummey, counsel for defendant, Conrad Morris Braker, in favor of the motion, and Mr. Wolcott G. Lane, of counsel for the plaintiffs in opposition.

It Is Ordered that this suit be and the same is hereby dismissed with costs to each defendant to be taxed by the Clerk.

E. HENRY LACOMBE,
U. S. C. J.

APPEAL AND ALLOWANCE.

(Filed March 27th, 1914.)

To the Honorable E. Henry Lacombe, District Judge of the Southern District of New York:

Your petitioners, The Provident Life & Trust Company, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and Catherine Stewart Wood as Executors under the Last Will and Testament of William Brewster Wood, deceased, the above named plaintiffs, conceiving themselves aggrieved by the Decree made and entered on the 27th day of March, 1914, in the above entitled cause, by which said Decree the Bill filed by your petitioners was dismissed, on the sole ground that upon all the pleadings and proceedings had therein no jurisdiction of the District Court of the United States existed, and the suit was dismissed for that reason alone, do hereby appeal from said Order and Decree to the Supreme Court of the United States, as authorized by

Section 238 of the Judicial Code, for the reasons specified in the Assignments of Error filed herewith, and your petitioners pray that this appeal may be allowed, and that a Transcript of the Record, proceedings and papers upon which the said Decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 27th day of March, 1914.

MILLER, KING, LANE & TRAFFORD,
Attorneys for Petitioners.

The foregoing claim of appeal is allowed, Bond to be entered in the sum of $250.00 to be approved by the Clerk.

Dated this 27th day of March, 1914.

E. HENRY LACOMBE,
United States Circuit Judge.

CERTIFICATE UNDER SECTION 238 OF THE JUDICIAL CODE.

(Filed March 27th, 1914.)

In this cause I HEREBY CERTIFY that this appeal is granted solely, and that the order of dismissal of the Bill herein made is based solely on the ground that no jurisdiction of the District Court existed; that this question has been so determined by me on the ground that one of the defendants herein was the assignor of an interest in a decedent's estate, which interest was assigned to the complainants herein, and that the said defendant assignor is a citizen of the same State as his co-defendant.

This Certificate is made conformably to Section 238 of the Judicial Code.

E. HENRY LACOMBE,
United States Circuit Judge.

ASSIGNMENTS OF ERROR.

(Filed March 27th, 1914.)

Your petitioners, The Provident Life & Trust Company and Catherine Stewart Wood, as Executors under the Last Will and Testament of William Brewster Wood, deceased, pray an appeal from the final Decree of this Court to the Supreme Court of the United States, and assign for error:

First.—That the learned District Court erred in dismissing the Bill in the above entitled cause for lack of jurisdiction.

Second.—The learned District Court erred in refusing to maintain jurisdiction of the above entitled cause.

MILLER, KING, LANE & TRAFFORD,
Attorneys for Petitioners.

CITATION AND SERVICE.

(Filed April 2, 1914.)

UNITED STATES OF AMERICA, *ss.*:

To Austin B. Fletcher as Testamentary Trustee of Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York, and Conrad Morris Braker, a citizen of the State of New York, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a Supreme Court of the United States to be holden at the City of Washington within 30 days from the date of this writ, pursuant to an appeal duly allowed by the District Court of the United States for

STIPULATION AS TO TRANSCRIPT OF RECORD AS PRINTED.

(Filed April 18th, 1914.)

It is hereby stipulated and agreed by and between the Complainants-Appellants and the Defendants-Appellees in the above-entitled action, binding upon the parties to said action, that the foregoing printed copy is a true transcript of the record as agreed on by the parties to said action.

Dated April 18th, 1914.

MILLER, KING, LANE & TRAFFORD,
Attorneys for Complainants-Appellants.

WILLIAM P. S. MELVIN,
Attorney for Defendant-Appellee Austin B. Fletcher, as Testamentary Trustee, etc.

SAFFORD A. CRUMMEY,
Attorney for Defendant-Appellee Conrad Morris Braker.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } *ss.:*

THE PROVIDENT LIFE AND TRUST COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and a citizen of the said State of Pennsylvania, and CATHERINE STEWART WOOD, a citizen of the State of Pennsylvania, as Executors under the Last Will and Testament of William Brewster Wood, deceased, also of the City of Philadelphia, State of Pennsylvania, and a late citizen of the said State of Pennsylvania,

Equity-10
No. 111.

against

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York, and CONRAD MORRIS BRAKER, a citizen of the State of New York.

I, ALEXANDER GALCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern
(Seal) District of New York, this 18th day of April, in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the said United States the one hundred and thirty-eighth.

ALEXANDER GILCHRIST, JR.,
Clerk.

No. 455

October Term, 1914.

IN THE

Supreme Court of the United States

THE PROVIDENT LIFE AND TRUST COMPANY and CATHERINE STEWART WOOD, as Executors Under the Last Will and Testament of WILLIAM BREWSTER WOOD, Deceased,

vs.

AUSTIN B. FLETCHER, as Testamentary Trustee of CONRAD MORRIS BRAKER Under the Last Will and Testament of CONRAD BRAKER, JR., Deceased, and CONRAD MORRIS BRAKER.

Appeal From the District Court of the United States for the Southern District of New York.

Brief on Behalf of Appellants.

PERRY D. TRAFFORD,
H. GORDON McCOUCH,
Solicitors for Appellants.

International, 236 Chestnut St.

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IN THE

Supreme Court of the United States.

October Term, 1914. No. .

THE PROVIDENT LIFE AND TRUST COMPANY AND CATHERINE STEWART WOOD, AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF WILLIAM BREWSTER WOOD, DECEASED,

v.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND CONRAD MORRIS BRAKER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLANTS.

STATEMENT OF THE CASE.

This case is before the Court on the sole question of the jurisdiction of the District Court under Section 238 of the Judicial Code.

The bill in equity was filed by appellants against Austin B. Fletcher as Testamentary Trustee of Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., deceased, and against Conrad Morris Braker, defendants below, appellees.

The bill (Record, pp. 1-11) showed that Conrad Morris Braker is entitled to receive one-half of a re-

siduary estate under the Sixteenth clause of the Will of Conrad Braker, Jr., upon attaining fifty-five years of age; that he had attained that age, and that the one-half interest to which he then became entitled amounted to approximately the sum of $120,000. That Conrad Morris Braker had sold his interest under the said Sixteenth clause of the said Will to the amount or extent of $20,000 to the New York Finance Company. That the New York Finance Company had assigned this interest in the legacy as collateral security for a promissory note of $15,000, upon which interest at the rate of six per cent. has been unpaid from January 5th, 1907 (Record, p. 31). Therefore, at the time of the filing of the Bill of Complaint, namely February 5th, 1913, more than the $20,000 share in the legacy assigned as collateral security had become due, since the interest for that period amounts to $5475. That after the execution and delivery of the said note to William Brewster Wood, the said William Brewster Wood died, and complainants became executors under his last Will and Testament. That on May 14th, 1912, the New York Finance Company assigned to complainants a formal release of the equity of redemption which as the maker of said note it had in the $20,000 share in the legacy. The principal averment of the Bill was that title to the said share mentioned in the said release amounted to $20,000, and prayer was made that title thereto should be decreed to be in the complainants, and the defendant Austin B. Fletcher be directed to pay over to them the said sum.

William Brewster Wood and complainants were citizens of the State of Pennsylvania, and Austin B. Fletcher, Trustee, and Conrad Morris Braker, were citizens of the State of New York at the time of the filing of the Bill. Conrad Morris Braker, a defendant, had been the assignor of a portion of the residuary

estate of his father, held by the other defendant as Trustee, having assigned the same to one William Brewster Wood, the complainants' testator.

The learned District Judge dismissed the bill, and his certificate (Record, p. 70) shows that the Bill was dismissed on the ground that Conrad Morris Braker, the defendant assignor was a citizen of the same State as Austin B. Fletcher, the defendant Trustee.

From the decree dismissing the Bill this appeal was taken in accordance with Section 238 of the Judicial Code.

SPECIFICATIONS OF ERROR.

First.—That the learned District Court erred in dismissing the Bill in the above-entitled cause for lack of jurisdiction.

Second.—The learned District Court erred in refusing to maintain jurisdiction of the above-entitled cause.

ARGUMENT.

The question presented is an extremely simple one, and has been already determined by this Court in the case of Ingersoll v. Coram, 211 U. S. 335. Therein this Court said:

> "It is charged that the right of the petitioner's intestate was derived from Root, and as he, it is further contended, could not have sued to establish his right to a share in the funds of the administrator, the latter and he being citizens of Montana, that the petitioner was equally disqualified to establish and recover Root's share of the property. The argument is that she is seeking to enforce a right of Root against the administrator arising on an equitable assignment by Root to her intestate, and she is therefore, it is said, suing to recover as assignee of a chose in action upon which the assignor could not sue, because his citizenship is the same as that of the administrator in Massachusetts. Sec. 629, Rev. Stat. There are several answers to the contention. It is certainly very disputable if an interest in a distributive share of an estate is within the statute. Again, she is suing primarily on the obligation of Root to her intestate to secure which a lien was given on Root's distributive share; and besides, again, she sues as administratrix, and she is a citizen of a different State from Leyson. Sere v. Pitot, 6 Cranch, 333; Chappedelaine v. Decheneaux, 4 Cranch, 308; Bushnell v. Kennedy, 9 Wall. 387; Coal Company v. Blatchford, 11 Wall. 172; Rice v. Houston, 13 Wall. 66" (at page 361).

It will be shown, therefore, first, that this case controls the jurisdictional questions presented by the case at bar; and secondly, that the decision in Ingersoll v. Coram followed the previous principles already enunciated by the Federal Courts.

First.—The Decision in Ingersoll v. Coram is Decisive of the Jurisdictional Questions Raised in the Case at Bar.

In that case Root was the claimant to a share in the estate of Davis. Root entered into an agreement with Ingersoll which amounted to an equitable assignment of his share as a fee for professional services. Ingersoll died, and his widow as administratrix brought suit against Leyson as administrator of the estate of Davis situate in Massachusetts. Leyson and Root were citizens of Montana. Ingersoll and his administratrix were citizens of New York. The objection was made that the administratrix was suing to enforce a right of Root, the assignor, against the administrator arising on an equitable assignment by Root to her intestate, the assignee, and that therefore it amounted to a suit to recover as assignee of a chose in action upon which the assignor could not sue, because both the assignor and the defendant administrator were citizens of Montana. The facts in the case at bar so far as the question of jurisdiction is concerned, are parallel with the facts in Ingersoll v. Coram.

Davis=Conrad Braker, Jr., the original decedent.

Root=Conrad Morris Braker, the party interested in the estate of the decedent, and assignor.

William Brewster Wood=Ingersoll, the assignee of the party interested in the decedent's estate.

Mrs. Ingersoll, the administratrix of Ingersoll, and plaintiff=Mrs. Wood and the Provident Life & Trust Company, executors of William Brewster Wood, and plaintiffs.

Leyson, administrator of Davis, defendant=Fletcher, Trustee of Conrad Morris Braker, defendant.

The Montana citizenship of Leyson and Root=the New York citizenship of Conrad Morris Braker and Fletcher, Trustee.

The New York citizenship of Ingersoll and his administratrix=the Pennsylvania citizenship of Mr. Wood and Mrs. Wood and the Provident Life & Trust Company, executors.

The parallel between the two cases is therefore complete and decisive.

In Brown v. Fletcher, 206 Federal, 461, now pending in this Court on certiorari, the Circuit Court of Appeals for the Second Circuit attempted to distinguish that case by saying:

> "The complainants are not asserting a lien in their own right upon Braker's interest in the decedent's estate, as was the case in Ingersoll v. Coram, 211 U. S. 336, but are asserting Braker's title to the sum of $10,000 to which they say they have succeeded."

While it is true that in the syllabus to Ingersoll v. Coram, the legal effect of the agreement, made with Robert G. Ingersoll by Root and Coram, is referred to as constituting "a lien on the distributive share of an heir of defendant's intestate," all through the opinion the interest is referred to indifferently as a lien or an equitable assignment. Thus, at page 361, in the opinion of the Court, quoted above, the right sought to be enforced by the administrator is spoken of as "arising on an equitable assignment by Root to her intestate"; and on page 368 the Court cites with approval in support of its findings Fourth Street Bank v. Yardley, 165 U. S. 634, where it was held, under the particular circumstances of the case, that, contrary to the usual rule, the check there given operates as an appropriation or *equitable assignment* of a fund in the hands of the drawee. Mr. Chief Justice White, in delivering the opinion in that case, said:

> "The deduction arises that as it cannot be reasonably conceived that the loan would have been made without the reference to an *assignment of the particular fund,* from which loan the hope of immediate payment was to be reasonably expected, the parties must have and did intend to create a particular appropriation charge or lien on the property, upon the faith of which they both dealt."

It is therefore submitted that the distinction attempted by the learned Circuit Court of Appeals for the Second Circuit is without a difference, because the lien referred to in Ingersoll v. Coram was not a statutory lien or a lien arising simply out of the employment, but resulted from an instrument of writing, the legal effect of which was to constitute an equitable assignment by Root of a portion of his distributive share in the estate of Davis, just as Braker here assigned a portion of his distributive share to Wood; Root and the Trustee of Davis's Estate, being citizens of the same State, just as Braker and Fletcher, Trustee, are in the case at bar.

There is, however, a real distinction (whether or not it be decisive) between the cases of Brown v. Fletcher on the one hand, and Ingersoll v. Coram and the case at bar on the other, in the fact that in Brown v. Fletcher the suit was not by an administrator or executor, whereas, both in Ingersoll v. Coram, and in the suit at bar, the suit was by an administrator or executor.

Second.—The Interpretation Placed Upon the Provisions of Section 629 R. S. (Now Section 24 [1st] of the Judicial Code) by This Court in Ingersoll v. Coram, Followed the Principles Enunciated in the Previous Decisions of This Court.

It will be well to consider this subject under the two heads suggested by the decision in Ingersoll v. Coram.

(a) An interest in a distributive share of an estate (*a fortiori* in a trust fund) is not within the Statute.

(b) The prohibition is against suits by "an assignee" and neither an administrator nor an executor are regarded as assignees within the Statute.

A.

AN INTEREST IN A DISTRIBUTIVE SHARE OF AN ESTATE (*a fortiori* in a trust fund) IS NOT WITHIN THE STATUTE.

The question here is the meaning of the phrase "chose in action" as used in the Statute. The learned District Judge in the case of Brown v. Fletcher, now in this Court on certiorari, in overruling the demurrer of the defendant, held that "the interest of a *cestui que trust* in a sum of money held for him by the trustee" was not "what the Statute meant by a 'chose in action.'" He cited the case of Croxall v. Shererd, 5 Wall. 268, wherein the question was as to the efficacy of a deed by a *cestui que trust* and the holding of this Court was that the *cestui que trust* was "actually seized of the freehold" and that the deed was valid. The learned District Judge then added:

> "In respect of personal property also the *cestui que trust* is entitled to possession of the *res* unless its nature precludes; in short, he is entitled at least on a case like this to all absoute interest save the legal title and actual possession. It would

> be a piece of doubtful pedantry, I think, in view of the usual meaning of the word 'chose in action' to apply it to a relation like that created by the fourteenth paragraph of the will."

In Eighteenth Century Common Law, at the time of the passage of the Judiciary Act of 1789, it is very clear that the term "chose in action" meant a right growing out of contract. It is true that subsequently the phrase came to be applied to any kind of right of action whether tortious or contractual in its origin. Many of the cases cited in the brief of counsel for the appellees on the motion to advance are illustrative of this modern explanation of the phrase. The question at bar is, however, not what it means or may mean today but what it meant in the Judiciary Act as interpreted by the decisions in this Court.

In Deshler v. Dodge, 16 How. 622, an action of replevin was brought by an assignee of a package of bank notes for their recovery. The Court held that such a suit was maintainable, and said:

> "It is admitted the assignors in this case could not have maintained the suit in the federal courts. We are of opinion that this clause of the Statute has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention; and that it applies only to cases in which the suit is brought to recover the contents, or to enforce the contract contained in the instrument assigned" (at page 630).

In Bushnell v. Kennedy, 9 Wall. 387, this Court discussed the question, and said:

> "It has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent. And it has also been determined that the assignee of a chose in action may maintain a suit in the Circuit Court

to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors. And it has recently been very strongly argued that the restriction applies only to contracts 'which may be properly said to have contents'; 'not mere naked rights of action founded on some wrongful act, some neglect of duty to which the law attaches damages, but rights of action founded on contracts which contain within themselves some promise or duty to be performed' " (at pages 391 and 392).

In Ambler v. Eppinger, 137 U. S. 480, the above quoted suit was to recover the value of certain trees and logs alleged to have been converted. The suit was by an assignee. This court sustained the jurisdiction. The preceding cases are considered, and the meaning of the phrase "chose in action" as it was understood at the time of the adoption of the Judiciary Statute is adopted as its proper interpretation.

This Court said:

"All of the decisions of this Court are in ac-
"cord with this interpretation of the Statute."

In Bertha Zinc & Mineral Company v. Vaughan, 88 Fed. 566, a daughter of a decedent who had died intestate, assigned all of her interest in the estate, which by several *mesne* assignments passed to a corporation, the complainant. It filed its Bill against the administrator to recover the daughter's distributive share. The defendants were all citizens of Virginia, as well as the daughter, and the complainant was a New Jersey corporation.

Said the Court:

"It (the case under discussion) is not founded on a contract, nor brought to enforce a contract, but to enforce obligations incurred by administra-

> tors of an estate in their official capacity, by a failure to properly discharge their fiduciary duties. A non-resident assignee, bringing suit of this character, is entitled to have the same heard in this Court."

It is true that in this case there had been a charge of dissipation of assets and the Bill was against the administrators for a devastavit and to recover the assigned interest in the estate. But certainly it is immaterial whether the recovery was of money in the hands of the administrators or of money which should have been in the hands of the administrators.

It is therefore respectfully submitted that the opinion expressed by Mr. Justice McKenna in delivering the opinion of this Court in Ingersoll v. Coram that an interest in a distributive share of an estate was not within the Statute, follows the principle of the decisions of this Court entirely apart from the language of the Act of 1875, repealed by the Act of 1887. It would seem obvious that an interest in an estate is not a contract such as Congress had in mind in passing the Act. Certainly, the interest of a *cestui que trust* in a trust fund is far less of a "chose in action" than a distributive share in an estate.

B.

THE PROHIBITION IS AGAINST SUITS BY "AN ASSIGNEE" AND NEITHER AN ADMINISTRATOR NOR AN EXECUTOR ARE REGARDED AS ASSIGNEES WITHIN THE STATUTE.

The decision in Ingersoll v. Coram only recognized the expressed decisions of this Court.

In Chappedelaine v. Dechenaux, 4 Cranch, 306, an objection to the maintenance of the suit was interposed, but Mr. Chief Justice Marshall held that the

suit was maintainable because it was by an executor, and that jurisdiction of the testators was unimportant. This decision was quoted by Mr. Chief Justice Marshall in Sere v. Pitot, 6 Cranch, 332, and the meaning of the Act was explained. Mr. Chief Justice Marshall concluded by saying:

> "The representatives of a deceased person are not usually designated by the term 'assignees,' and are therefore not within the word of the Act" (at page 336).

In Rice v. Houston, 13 Wall. 66, on an agreed state of facts, this Court held:

> "Although in controversies between citizens of different states, it is the character of the real and not that of the nominal parties to the record which determines the question of jurisdiction, yet it has been repeatedly held by this Court that suits can be maintained in the Circuit Court by executors or administrators if they are citizens of a different state from the party sued, on the ground that they are the real parties in interest, and succeed to all the rights of the testator or intestate by operation of law" (at page 67).

The decision in Ingersoll v. Coram simply applies the same legal principle to plaintiff administrators in a case where there have been intermediate assignees prior to the death of the party represented by such administrator. It is submitted that this is an immaterial point, and that since an administrator is not in any sense of the term, as Mr. Chief Justice Marshall pointed out, an "assignee" it is immaterial whether or not there may have been several *mesne* assignments.

The fact that the New York Finance Company executed a release to the executors of their theoretical equity of redemption is wholly immaterial, since at the time of the beginning of the suit, the amount due on the

note of $15,000 amounted to more than the distributive share of the legacy. Therefore if the suggestions made by the learned counsel for the appellee in his brief on the motion to advance had otherwise merit, such question need not be discussed, since the averments with respect to the release are surplusage.

In conclusion, it is respectfully urged that the facts and the decision of this Court in Ingersoll v. Coram have foreclosed the question of jurisdiction as applicable to the case at bar. But if any distinction, unperceived by counsel for appellants, exists, it is submitted that a suit against a trustee to establish a lien upon a distributive share in a decedent's estate can hardly be described as a suit to recover the contents of a chose in action, and that the trend and character of the decisions of this Court establish the principle that such suit is without the Statute.

PERRY D. TRAFFORD,
H. GORDON McCOUCH,
Solicitors for Appellants.

No. 455 October Term, 1913.

IN THE

Supreme Court of the United States

PROVIDENT LIFE AND TRUST COMPANY, AND CATHERINE STEWART WOOD, Executors of the Estate of William Brewster Wood, Deceased,

Appellants,

versus

AUSTIN B. FLETCHER, as Testamentary Trustee Under the Last Will and Testament of Conrad Braker, Jr., Deceased, and Conrad Morris Braker,

Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

REPLY BRIEF ON BEHALF OF APPELLANTS.

PERRY D. TRAFFORD,
H. GORDON McCOUCH,
Solicitors for Appellants.

International, 256 Chestnut St.

IN THE

Supreme Court of the United States.

PROVIDENT LIFE & TRUST COMPANY AND CATHERINE STEWART, EXECUTORS OF THE ESTATE OF WILLIAM BREWSTER WOOD, DECEASED,

Appellants,

v.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER, UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND CONRAD MORRIS BRAKER,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF ON BEHALF OF THE APPELLANTS.

The brief filed on behalf of the appellees at page 15 raises a question which is not noticed in the brief heretofore filed by the appellants, and which perhaps deserves a brief explanation and comment.

The appellants were assignees as collateral security of an interest in a legacy, which interest amounted to the sum of $20,000. The debt to which such interest was collateral was the principal sum of $15,000 with interest at the rate of six per cent. per annum from January 5th, 1907 (Bill of Complaint, Record, p. 31). Therefore, at the time of the filing of the bill of complaint, namely, February 25th, 1913, more than the amount of the interest in the legacy assigned as col-

lateral security was due complainants by virtue of the note delivered to their testator.

On May 14th, 1912, the complainants obtained from an intermediate assignee a formal release of the equity of redemption which the maker of the aforesaid note had in the said interest in the legacy. This fact is, however, wholly immaterial in this case, since at the time of the filing of the Bill such equity had no value whatever. The bill of complaint is based, primarily, upon the claim to recover the interest in the legacy assigned as collateral security to the note of $15,000 with interest (Bill of Complaint, paragraph 11th, Record, p. 6), and can be maintained without any reliance upon the assignment of the theoretic equity of redemption. It therefore follows that the contention of the appellants-complainants that this case is ruled by Chappedelaine vs. Dechenaux, 4 Cranch, 306, and similar cases is not answered by the subsequent securing by the appellants of what is really a quit-claim deed.

Respectfully submitted,

PERRY D. TRAFFORD,
H. GORDON McCOUCH,
Solicitors for Appellants.

No. 455 October Term, 1913.

IN THE

Supreme Court of the United States

PROVIDENT LIFE AND TRUST COMPANY, AND CATHARINE STEWART WOOD, Executors of the Estate of William Brewster Wood, Deceased,

Appellants,

versus

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, Under the Last Will and Testament of Conrad Braker, Jr., Deceased, and Conrad Morris Braker,

Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

Motion to Advance and Brief on Behalf of Appellants.

PERRY D. TRAFFORD,
H. GORDON McCOUCH,
Solicitors for Appellants.

International, 256 Chestnut St.

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IN THE

Supreme Court of the United States.

PROVIDENT LIFE & TRUST COMPANY AND CATHARINE STEWART WOOD, EXECUTORS OF THE ESTATE OF WILLIAM BREWSTER WOOD, DECEASED,

Appellants,

v.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND CONRAD MORRIS BRAKER,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

AND NOW, this Eleventh day of May, 1914, come the Appellants, by their Counsel, and move the Court to advance the above-entitled cause for hearing in the manner prescribed by Rule Six in accordance with Rule Thirty-two of this Court, because the only question in issue is the question of the jurisdiction of the Court below, and this Appeal is taken under Section 238 of the Judicial Code.

PERRY D. TRAFFORD,
H. GORDON McCOUCH,

Solicitors for Appellants.

EASTERN DISTRICT OF PENNSYLVANIA, *ss.:*

RAYMOND C. KARGE, being duly sworn according to law, deposes and says; that on the eighteenth day of April, 1914, he deposited in the mail at the General Post Office, in the City of Philadelphia, Pennsylvania, a notice in the form attached hereto as Exhibit "A" and 5 copies of this Brief, addressed to Safford A. Crummey, Esq., 165 Broadway, New York City, N. Y., and to William P. S. Melvin, Esq., 165 Broadway, New York City, N. Y., the proper address of the counsel for the Appellees, duly postpaid, and that by due course of mail the said letters would reach the counsel for the Appellees on April twentieth, 1914.

RAYMOND C. KARGE.

Sworn to and subscribed before me, this Eighteenth day of April, 1914.

(Seal) GEORGE KOPPENHOEFER, JR.
Notary Public.
My Commission Expires March 10th, 1917.

EXHIBIT "A."

April 18, 1914.

Safford A. Crummey, Esq.,
and
William P. S. Melvin, Esq.,
165 Broadway,
New York City, N. Y.

Dear Sirs:—

Please take notice that on Monday, May 11th, 1914, we will present to the Supreme Court of the United States, in the matter of Provident Life & Trust Company and Catherine Stewart Wood, Executors, v. Austin B. Fletcher, Testamentary Trustee, and Conrad Morris Braker, the motion, of which the enclosed is a copy. We also hand you herewith 5 copies of the brief which will be presented with the motion.

Yours respectfully,
PERRY D. TRAFFORD,
H. GORDON McCOUCH,
Solicitors for Appellants.

STATEMENT OF THE CASE.

This case is before the Court on the sole question of the jurisdiction of the District Court under Section 238 of the Judicial Code.

The bill in equity was filed by appellants against Austin B. Fletcher as Testamentary Trustee of Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., deceased, and against Conrad Morris Braker, defendants below, appellees.

The bill (Record, pp. 1-11) showed that Conrad Morris Braker is entitled to receive one-half of a residuary estate under the Sixteenth clause of the Will of Conrad Braker, Jr., upon attaining fifty-five years of age; that he had attained that age, and that the one-half interest to which he then became entitled amounted to approximately the sum of $120,000. That Conrad Morris Braker had sold his interest under the said Sixteenth clause of the said Will to the amount or extent of $20,000 and that the title in the said $20,000 had become vested in one William Brewster Wood. That William Brewster Wood had since died, and that complainants herein were executors under his last Will and Testament. The prayer of the Bill was that title to the said $20,000 might be decreed to be in complainants, and defendant Austin B. Fletcher, Trustee, directed to pay over the said sum.

William Brewster Wood and complainants were citizens of the State of Pennsylvania, and Austin B. Fletcher, Trustee, and Conrad Morris Braker, were citizens of the State of New York at the time of the filing of the Bill. Conrad Morris Braker, a defendant, had been the assignor of a portion of the residuary estate of his father, held by the other defendant as Trustee, having assigned the same to one William Brewster Wood, the complainants' testator.

The learned District Judge dismissed the bill, and his certificate (Record, p. 70) shows that the Bill was dismissed on the ground that Conrad Morris Braker, the defendant assignor was a citizen of the same State as Austin B. Fletcher, the defendant Trustee.

From the decree dismissing the Bill this appeal was taken in accordance with Section 238 of the Judicial Code.

SPECIFICATIONS OF ERROR.

First.—That the learned District Court erred in dismissing the Bill in the above-entitled cause for lack of jurisdiction.

Second.—The learned District Court erred in refusing to maintain jurisdiction of the above-entitled cause.

ARGUMENT.

The question presented is an extremely simple one, and has been already determined by this Court in the case of Ingersoll v. Coram, 211 U. S. 335. Therein this Court said:

> "It is charged that the right of the petitioner's intestate was derived from Root, and as he, it is further contended, could not have sued to establish his right to a share in the funds of the administrator, the latter and he being citizens of Montana, that the petitioner was equally disqualified to establish and recover Root's share of the property. The argument is that she is seeking to enforce a right of Root against the administrator arising on an equitable assignment by Root to her intestate, and she is therefore, it is said, suing to recover as assignee of a chose in action upon which the assignor could not sue, because his citizenship is the same as that of the administrator in Massachusetts. Sec. 629, Rev. Stat. There are several answers to the contention. It is certainly very disputable if an interest in a distributive share of an estate is within the statute. Again, she is suing primarily on the obligation of Root to her intestate to secure which a lien was given on Root's distributive share; and besides, again, she sues as administratrix, and she is a citizen of a different State from Leyson. Sere v. Pitot, 6 Cranch, 333; Chappedelaine v. Dechenaux, 4 Cranch, 308; Bushnell v. Kennedy, 9 Wall. 387; Coal Company v. Blatchford, 11 Wall. 172; Rice v. Houston, 13 Wall. 66" (at page 361).

It will be shown, therefore, first, that this case controls the jurisdictional questions presented by the case at bar; and secondly, that the decision in Ingersoll v. Coram followed the previous principles already enunciated by the Federal Courts.

The Montana citizenship of Leyson and Root=the New York citizenship of Conrad Morris Braker and Fletcher, Trustee.

The New York citizenship of Ingersoll and his administratrix=the Pennsylvania citizenship of Mr. Wood and Mrs. Wood and the Provident Life & Trust Company, executors.

The parallel between the two cases is therefore complete and decisive.

In Brown v. Fletcher, 206 Federal, 461, now pending in this Court on certiorari, the Circuit Court of Appeals for the Second Circuit attempted to distinguish that case by saying:

> "The complainants are not asserting a lien in their own right upon Braker's interest in the decedent's estate, as was the case in Ingersoll v. Coram, 211 U. S. 336, but are asserting Braker's title to the sum of $10,000 to which they say they have succeeded."

While it is true that in the syllabus to Ingersoll v. Coram, the legal effect of the agreement, made with Robert G. Ingersoll by Root and Coram, is referred to as constituting "a lien on the distributive share of an heir of defendant's intestate," all through the opinion the interest is referred to indifferently as a lien or an equitable assignment. Thus, at page 361, in the opinion of the Court, quoted above, the right sought to be enforced by the administrator is spoken of as "arising on an equitable assignment by Root to her intestate"; and on page 368 the Court cites with approval in support of its finding Fourth Street Bank v. Yardley, 165 U. S. 634, where it was held, under the particular circumstances of the case, that, contrary to the usual rule, the check there given operates as an appropriation or *equitable assignment* of a fund in the hands

First.—The Decision in Ingersoll v. Coram is Decisive of the Jurisdictional Questions Raised in the Case at Bar.

In that case Root was the claimant to a share in the estate of Davis. Root entered into an agreement with Ingersoll which amounted to an equitable assignment of his share as a fee for professional services. Ingersoll died, and his widow as administratrix brought suit against Leyson as administrator of the estate of Davis situate in Massachusetts. Leyson and Root were citizens of Montana. Ingersoll and his administratrix were citizens of New York. The objection was made that the administratrix was suing to enforce a right of Root, the assignor, against the administrator arising on an equitable assignment by Root to her intestate, the assignee, and that therefore it amounted to a suit to recover as assignee of a chose in action upon which the assignor could not sue, because both the assignor and the defendant administrator were citizens of Montana. The facts in the case at bar, so far as the question of jurisdiction is concerned, are parallel with the facts in Ingersoll v. Coram:

Davis=Conrad Braker, Jr., the original decedent.

Root=Conrad Morris Braker, the party interested in the estate of the decedent, and assignor.

William Brewster Wood=Ingersoll, the assignee of the party interested in the decedent's estate.

Mrs. Ingersoll, the administratrix of Ingersoll, and plaintiff=Mrs. Wood and the Provident Life & Trust Company, executors of William Brewster Wood, and plaintiffs.

Leyson, administrator of Davis, defendant=Fletcher, Trustee of Conrad Morris Braker, defendant.

of the drawee. Mr. Chief Justice White, in delivering the opinion in that case, said:

> "The deduction arises that as it cannot be reasonably conceived that the loan would have been made without the reference to an *assignment of the particular fund*, from which loan the hope of immediate payment was to be reasonably expected, the parties must have and did intend to create a particular appropriation charge or lien on the property, upon the faith of which they both dealt."

It is therefore submitted that this is a distinction without a difference, because the lien referred to in Ingersoll v. Coram was not a statutory lien or a lien arising simply out of the employment, but resulted from an instrument of writing, the legal effect of which was to constitute an equitable assignment by Root of a portion of his distributive share in the estate of Davis, just as Braker here assigned a portion of his distributive share to Wood; Root and the Trustee of Davis's Estate, being citizens of the same State, just as Braker and Fletcher, Trustee, are in the case at bar.

There is, however, a real distinction (whether or not it be decisive) between the cases of Brown v. Fletcher on the one hand, and Ingersoll v. Coram and the case at bar on the other, in the fact that in Brown v. Fletcher the suit was not by an administrator or executor, whereas, both in Ingersoll v. Coram, and in the suit at bar, the suit was by an administrator or executor.

Second.—The Interpretation Placed Upon the Provisions of Section 629 R. S. (Now Section 24 [1st] of the Judicial Code) by This Court in Ingersoll v. Coram, Followed the Principles Enunciated in the Previous Decisions of This Court.

It will be well to consider this subject under the two heads suggested by the decision in Ingersoll v. Coram.

(a) An interest in a distributive share of an estate (*a fortiori* in a trust fund) is not within the Statute.

(b) The prohibition is against suits by "an assignee" and neither an administrator nor an executor are regarded as assignees within the statute.

A.

AN INTEREST IN A DISTRIBUTIVE SHARE OF AN ESTATE (*a fortiori* in a trust fund) IS NOT WITHIN THE STATUTE.

The question here is the meaning of the phrase "chose in action" as used in the statute. The learned District Judge in the case of Brown v. Fletcher, now in this Court on certiorari, in overruling the demurrer of the defendant, held that "the interest of a *cestui que trust* in a sum of money held for him by the trustee" was not "what the statute meant by a 'chose in action.'" He cited the case of Croxall v. Shererd, 5 Wall. 268, and concluded:

> "In respect of personal property also the *cestui que trust* is entitled to possession of the *res* unless its nature precludes; in short, he is entitled at least on a case like this to all absolute interest save the legal title and actual possession. It would be a piece of doubtful pedantry, I think, in view of the usual meaning of the word 'chose in action' to apply it to a relation like that created by the fourteenth paragraph of the will."

In Croxall v. Shererd, 5 Wall. 268, the question was of the effect of a deed by a *cestui que trust*. This Court held:

> "In the consideration of a court of equity, the *cestui que trust* is actually seized of the freehold. He may alien it, and any legal conveyance by him will have the same operation in equity upon the trust, as it would have had at law upon the legal estate" (at page 281).

In Deshler v. Dodge, 16 How. 622, an action of replevin was brought by an assignee of a package of bank notes for their recovery. The Court held that such a suit was maintainable, and said:

> "It is admitted the assignors in this case could not have maintained the suit in the federal courts. We are of opinion that this clause of the statute has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention; and that it applies only to cases in which the suit is brought to recover the contents, or to enforce the contract contained in the instrument assigned" (at page 630).

In Bushnell v. Kennedy, 9 Wall. 387, this Court discussed the question, and said:

> "It has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent. And it has also been determined that the assignee of a chose in action may maintain a suit in the Circuit Court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors. And it has recently been very strongly argued that the restriction applies only to contracts 'which may be properly said to have contents'; 'not mere naked rights of action founded on some wrongful act, some neg-

> lect of duty to which the law attaches damages, but rights of action founded on contracts which contain within themselves some promise or duty to be performed' " (at pages 391 and 392).

In Ambler v. Eppinger, 137 U. S. 480, the suit was to recover the value of certain trees and logs alleged to have been converted. The suit was by an assignee. This court sustained the jurisdiction and quoted with approval the above cited case of Deshler v. Dodge, and Bushnell v. Kennedy, citing the latter case to hold "that the objection to the jurisdiction applied only to rights of action founded on contracts which contained within themselves some promise or duty to be performed" (at p. 483).

In Bertha Zinc & Mineral Company v. Vaughan, 88 Fed. 566, a daughter of a decedent who had died intestate, assigned all of her interest in the estate, which by several *mesne* assignments passed to a corporation, the complainant. It filed its Bill against the administrator to recover the daughter's distributive share. The defendants were all citizens of Virginia, as well as the daughter, and the complainant was a New Jersey corporation.

Said the Court:

> "It (the case under discussion) is not founded on a contract, nor brought to enforce a contract, but to enforce obligations incurred by administrators of an estate in their official capacity, by a failure to properly discharge their fiduciary duties. A non-resident assignee, bringing suit of this character, is entitled to have the same heard in this Court."

It is therefore respectfully submitted that the opinion expressed by Mr. Justice McKenna in delivering the opinion of this Court in Ingersoll v. Coram that an interest in a distributive share of an estate was

not within the statute, follows the principle of the decisions of this Court entirely apart from the language of the Act of 1875, repealed by the Act of 1887. It would seem obvious that an interest in an estate is not a contract such as Congress had in mind in passing the Act. Certainly, the interest of a *cestui que trust* in a trust fund is far less of a "chose in action" than a distributive share in an estate.

B.

THE PROHIBITION IS AGAINST SUITS BY "AN ASSIGNEE" AND NEITHER AN ADMINISTRATOR NOR AN EXECUTOR ARE REGARDED AS ASSIGNEES WITHIN THE STATUTE.

The decision in Ingersoll v. Coram only recognized the expressed decisions of this Court.

In Chappedelaine v. Dechenaux, 4 Cranch, 306, an objection to the maintenance of the suit was interposed, but Mr. Chief Justice Marshall held that the suit was maintainable because it was by an executor, and that jurisdiction of the testators was unimportant. This decision was quoted by Mr. Chief Justice Marshall in Sere v. Pitot, 6 Cranch, 332, and the meaning of the Act was explained. Mr. Chief Justice Marshall concluded by saying:

> "The representatives of a deceased person are not usually designated by the term 'assignees,' and are therefore not within the word of the Act" (at page 336).

In Rice v. Houston, 13 Wall. 66, on an agreed state of facts, this Court held:

> "Although in controversies between citizens of different states, it is the character of the real and not that of the nominal parties to the record which determines the question of jurisdiction, yet it has been repeatedly held by this Court that suits can be maintained in the Circuit Court by execu-

tors or administrators if they are citizens of a different state from the party sued, on the ground that they are the real parties in interest, and succeed to all the rights of the testator or intestate by operation of law'' (at p. 67).

The decision in Ingersoll v. Coram simply applies the same legal principle to plaintiff administrators in a case where there have been intermediate assignees prior to the death of the party represented by such administrator. It is submitted that this is an immaterial point, and that since an administrator is not in any sense of the term, as Mr. Chief Justice Marshall pointed out, an ''assignee'' it is immaterial whether or not there may have been several *mesne* assignments.

In conclusion, it is respectfully urged that the facts and the decision of this Court in Ingersoll v. Coram have foreclosed the question of jurisdiction as applicable to the case at bar. But if any distinction, unperceived by counsel for appellants, exists, it is submitted that a suit against a trustee to establish a lien upon a distributive share in a decedent's estate can hardly be described as a suit to recover the contents of a chose in action, and that the trend and character of the decisions of this Court establish the principle that such suit is without the statute.

PERRY D. TRAFFORD,
H. GORDON McCOUCH,
Solicitors for Appellants.

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No. ~~1028~~.

No. October Term, 1913.

Supreme Court of the United States

PROVIDENT LIFE AND TRUST COMPANY and CATHARINE STEWART WOOD, Executors of the Estate of William Brewster Wood, deceased,

Appellants,

vs.

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and CONRAD MORRIS BRAKER,

Appellees.

BRIEF ON PART OF AUSTIN B. FLETCHER, AS TRUSTEE, &C., APPELLEE.

WILLIAM P. S. MELVIN,
Solicitor for Defendant
Austin B. Fletcher, Appellee.

SAFFORD A. CRUMMEY,
Solicitor for Conrad Morris Braker,
Defendant.

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Supreme Court of the United States

PROVIDENT LIFE AND TRUST COMPANY and CATHARINE STEWART WOOD, Executors of the Estate of William Brewster Wood, deceased,

Appellants,

vs.

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and CONRAD MORRIS BRAKER,

Appellees.

Statement of the Case.

The bill of complaint shows that one Conrad Braker, Jr., by the fifteenth and sixteenth sections or paragraphs of his Last Will and Testament (pages 17, 18), established separate trust funds in favor of Conrad Morris Braker, making Henry J. Braker the trustee thereof, and that under the terms of the Will he was directed to hold

the funds for the use of said *cestui que trust* until he should be fifty-five years of age, which would be on February 25, 1913. That the defendant Austin B. Fletcher, on November 16th, 1897, was appointed trustee by the Surrogates' Court of the County of New York, to succeed Henry J. Braker, and to execute the unexecuted trusts under the Will (pages 3, 4), and that he now holds said trust funds.

The bill shows the following assignment to have been made by the *cestui que trust*, Conrad Morris Braker, of interests in said trust funds; and it also shows the subsequent *mesne* assignments thereof subsequently made and hereinafter enumerated, until such interests finally lodged in the hands of the complainants:—

First.—On February 25, 1902, the defendant and *cestui que trust*, Conrad Morris Braker, by deed of assignment transferred to the New York Finance Company all the right, title and interest to which he was entitled, to the extent of $35,000.00, in the legacy of $50,000.00, and in the legacy of the share in the residuary under the fifteenth and sixteenth paragraphs of said Will, subject to the payment of seven-tenths of the legacy for $50,000.00 under the fifteenth paragraph of the Will, which had theretofore been assigned by him to one Frank L. Rabe (page 5; Exhibit "B," pages 20-26).

Second.—On March 5, 1902, the New York Finance Company, by deed of assignment, in consideration of $15,000.00, transferred to William Brewster Wood all the right, title and interest of any kind which it had or might thereafter have in the estate of Conrad Braker, Jr., by virtue of the

preceding assignment (page 6; Exhibit "D," pages 27-29).

This deed, as appears thereby, was given for the purpose of securing the payment with interest to William Brewster Wood on July 5, 1908, of the promissory note of the New York Finance Company of even date therewith, for $15,000.00 (pages 5, 6; Exhibit "C," pages 25, 26).

THIRD.—On May 14, 1912, the New York Finance Company, by deed of assignment, "bargained, sold, assigned, transferred, set over and quit-claimed" unto Catharine Stewart Wood and the Provident Life & Trust Company of Philadelphia, Executors of the Will of William Brewster Wood, deceased (the complainants) "all the equity of redemption, right, title and interest whatsoever which the said New York Finance Company now has or might or could have in and to the above described interest of $20,000.00 in the estate of Conrad Braker, Jr., deceased, so assigned by it to William Brewster Wood as collateral security for a debt of $15,000.00 and interest" (page 7; Exhibit "E," pages 30-34).

It will be seen by an inspection of this deed of assignment (Exhibit "E") that it is supported by an entirely new consideration for its execution, passing between the said executors and the New York Finance Company. It refers to the original instrument of assignment from Conrad Morris Braker to the New York Finance Company; it recites the above deed of assignment given by it to William Brewster Wood as security for the payment of its note of $15,000.00; the death of Wood, and the appointment of the complainants as executors, and it thereupon states an account as of the time when Braker shall have attained the age of fifty-five years, between the New York Fi-

nance Company and the executors of William Brewster Wood as to their respective rights; and it also states an account between said executors and the New York Finance Company as to another indebtedness arising out of one of said company's notes for $9,500 (entirely foreign to Braker's interest); and it then recites that the company has agreed to sell to the executors of the estate of William Brewster Wood any equity it has in the estate of Conrad Braker, Jr., assigned by it to William Brewster Wood, "in consideration of being given a credit of One hundred Dollars ($100) upon the interest due by it on the note last above described" (said note of $9,500) and the deed declares that it is "*in consideration of the premises and of One hundred Dollars* ($100) *to it in hand paid*," &c., &c.

The defendants have answered the bill separately. The answer of the defendant, Austin B. Fletcher, shows by allegation V (page 36), as a fourth defense, that upon the face of the bill the District Court had not cognizance of the suit.

On March 27, 1911, a motion was made on the part of the defendant, Austin B. Fletcher, before one of the Justices of the United States District Court for the Southern District of New York, upon the bill of complaint and the defendant's answer for a decretal order dismissing the suit on the ground that the Court had not cognizance thereof (page 67) and, after hearing, the suit was ordered dismissed (page 68).

Argument.

The only questions presented to the Court on this appeal are whether the assignment made by the defendant, Conrad Morris Braker, on February 25, 1902, to the New York Finance Company of a part of his interest in a trust fund established for his benefit, was an assignment of a *chose in action*, and, if so, whether the District Court for the Southern District of New York, was precluded from taking cognizance of the suit brought against the Trustee and *cestui que trust* to enforce the assignment, because of the provision of the Judicial Code (Sec. 24, First par.) prohibiting the entertainment of any such suit in the court unless it might have been prosecuted in the court if no assignment had been made,—it appearing by the bill that both the Trustee and the *cestui que trust* are citizens of the State of New York; and whether the fact that this suit is brought by the complainants in their representative character, as executors, has any effect as to the application of the above statute.

The above section of the Judicial Code contains a law that has stood with but slight change since the time of its promulgation by the Judiciary Act of 1789. Its language almost continuously since that time has been against the cognizance by the trial court of a suit "*to recover the contents of any promissory note or other chose in action*," now its prohibitory terms are against the cognizance of any suit "*to recover upon any promissory note or other chose in action.*"

When referring to the time since the original promulgation of the act, I except, of course, the period during which the amendment of 1875 was in operation (until March 3, 1887), when the prohibition was against cognizance "of any suit founded on a contract in favor of an assignee unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant and bills of exchange."

The change made by the present law,—"to recover upon any promissory note or other chose in action"—would seem to greatly enlarge the jurisdiction of the District Court, but, be this as it may, it does not affect this present controversy, for whether the law has reference to the *contents* of a *chose in action*, or simply to a *chose in action*, it is plain that in either case the court can take no cognizance of this action. There can be no doubt it is founded on a *chose in action;* that there has been an assignment of it, and that by reason of the assignor's citizenship the lower court could not take cognizance.

Chief Justice Marshall said in Sere vs. Pitot (6 Cranch, 333), as to the term "*other chose in action*,"—that it was broad enough to comprehend either those who could sue by legal or those who could sue by virtue of *equitable assignments*, and that the word "contents" was too ambiguous in its import to restrain that general term,—i. e., *chose in action*. "The contents of a note," he said, "are the sum it shows to be due."

In Shoecraft vs. Bloxham (124 U. S., 730; 31 L. e., 574), the Court said:

> "The contents of any promissory note, or other 'chose in action' were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey the meaning, but they have received a construction substantially to that purport in repeated decisions of this court."

In Corbin vs. Black Hawk Co. (105 U. S., 659; 26 L., ed., 1136), which was a suit for the specific performance of contract for the purchase of land, Judge Blatchford said that such a suit must be regarded as one to recover the contents of a contract as a chose in action, and so not maintainable by an assignee if it could not have been prosecuted had no assignment been made. *Equitable* as well as legal assignments are included. He said:

> "The contents of a contract as a chose in action in the sense of Section 629 are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents. The promise to pay money contained in a promissory note is all that there is of the note. A suit to enforce the payment of the money is a suit to recover the contents of the note, because there is nothing contained in the note but the promise."

This court has itself given us a definition of what is a *chose in action*. In Sheldon vs. Sill, 49 U. S., 441; 12 L., ed., 1147, 1151, Judge Grier says:

> "The term 'chose in action' is one of comprehensive import. It includes all the infinite varieties of contracts, covenants and promises which confer on one party a right to recover a personal chattel or a sum of money by action."

In Bushnell vs. Kennedy (9 Wall., 387; 19 L. e., 738) Chief Justice Chase says regarding the term "*chose in action*," that:

> "Under that comprehensive description are included all debts and all claims for damages for breach of contract, or for torts connected with contract."

As used in the statute, there are no accompanying expressions whatever delimiting the breadth of the term "*chose in action.*" We submit that Congress in framing the law did not design to lessen, or qualify, or restrict the significance of those words; on the contrary, their purpose was not to minimize, but to adopt a word of great scope, and the great aim of the statute was to prevent, as far as possible, the entertainment of any suits in the Federal Courts, other than those strictly arising between citizens of different states, apprehending that unless such care were taken, the courts would be overborne by the volume of suits cunningly brought before them by force of assignments more specious than real. The legislators were concerned that the jurisdiction of the Court should be such as to bar out all others than genuine assignments between citizens of different states.

> Bushnell vs. Kennedy, 76 U. S., 387; 19 L. ed., 737, 738.

Under the head "*chose*,"—"*choses in action*," Bouvier in his Law Dictionary gives us as definition—

> "Personal things, of which the owner has not the possession, but merely a right of action for their possession."

And he refers to 2 Blackstone Comm., 389, 397. In Blackstone we read:

> "Property in chattels personal may be either *in possession*, which is where a man hath not only the right to enjoy but hath the actual enjoyment of the thing; or else, it is in action where a man hath only a bare right without any occupation or enjoyment."

Book 2, 389.

Again he says:

> "We will proceed next to take a short view of the nature of property *in action*, or such where a man hath not the occupation but merely a bare right to occupy the thing in question the possession whereof may, however, be recovered by a suit or action at law; from whence the thing so recoverable is called a thing or *chose in action*."

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A *chose in action* is said to be a thing not in occupation or enjoyment, but merely a bare right to be recovered by an action, hence its name.

U. S. vs. Moulton, 27 Fed. Cas., 11, 12.

An assignment in a testamentary trust fund is characterized as an assignment of a *chose in action.*

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A *chose in action,* or a thing in action, is a term used in contradistinction to a chose, or thing, in possession.

Ayres vs. West R. R. Co., 48 Barb., 135.

A *chose in action* includes all rights to personal property not in possession, which may be enforced by action.

Gillett vs. Fairchild, 4 Den., 80.

"It is a right of proceeding in a court of law to procure the payment of a sum of money. The term is used in contradistinction to choses in possession, which were chattels of which one is in possession or control, such as corn, wheat, books and the like.

One view has restricted the term to rights of action for money arising under contract, but while it comprehends these, whatever the contract, it is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a wrong afflicted either upon the person or property."

Citing,—

Gillett vs. Fairchild, supra, McKee vs. Judd., 12 N. Y., 622; Williams Per. Prop. 4.

3 Amer. & Eng. Encyc. Sub Tit. "Choses in Action," 236.

The right to sue for a trust fund misapplied by the trustee is an *equitable chose in action* (id.).

A *chose in action* is defined to be "the interest in a contract which in case of non-performance can only be reduced into beneficial enjoyment by an action or suit."

Haskell vs. Blair, 57 Mass., 534, 536.

A life insurance policy has been held to be a chose in action,

Prudential Life Ins. Co. vs. Hunn, 21 Ind. App., 525, 529,

even before the death of the insured.

Steele vs. Gatlin, 115 Ga., 929.

Pertinent, too, is the opinion of the Circuit Court of Appeals for the Second District in Brown vs. Fletcher (206 Fed. Rep., 461), a case very similar in its character to that now before the Court. It was a suit between the same complainants and this defendant-trustee to recover on the assignment made by the same *cestui que trust* of another trust fund created under the same will. In it the objection was raised, as now, to the Court's jurisdiction. Judge Learned Hand of the U. S. District Court, in overruling the demurrer, conceded upon the question whether the interest of the *cestui que trust* in the sum of money held for him by the trustee, was or was not a *chose in*

action under Sec. 24 of the Judiciary Code—that such was no doubt the case "*in strict legal theory,*" but he said that he did not think the *cestui que trust's* interest is what the statute meant by a *chose in action.*" The case went to hearing resulting in a decision on the merits in favor of the defendant. An appeal was taken to the Circuit Court of Appeals and again it was objected by the defendant that the lower Court did not have jurisdiction and the Appellate Court dismissed the suit upon that and other grounds.

The cause is now pending in this Court on writ of certiorari.

The Circuit Court of Appeals says, with reference to the assignment:

> "The complainants are not asserting a lien in their own right upon Braker's interest in the decedent's estate, as was the case in Ingersoll vs. Coram, 211 U. S., 336, but are asserting Braker's title to the sum of $10,000.00 to which they say they have succeeded. *This is clearly a chose in action,* that is a claim not in possession, but which must be enforced by an action against the trustee, Sheldon vs. Sill, 49 U. S., 441. As their assignors could not maintain an action in the District Court, the complainants cannot."

The Ingersoll case (Ingersoll vs. Coram, 211 U. S., 336), upon which so much stress is laid by the appellants, will be found on criticism to vary greatly from the present. That action was not based upon an assignment of a *chose in action.* It was an action brought upon a contract of em-

ployment to have an attorney's lien declared and foreclosed upon property realized because of the litigation following the employment. The facts were simply that Andrew J. Davis, a wealthy man, died and by his will left all his property to his brother. Certain of his next of kin united to contest the probate of the will. Two of these agreed with their associates to conduct and finance the litigation in the interest of all, receiving therefor an assignment of part of the outcome that might be secured for the others. Those two made a bargain with Col. "Bob" Ingersoll for his professional services agreeing that if the will were set aside his fee should be $100,000. Pending the litigation a compromise, however, was effected, and, as a result, it was claimed that an equitable lien in favor of Ingersoll and his legal representatives attached to the interests of the contestants and that the assets in Massachusetts should be subject to the debt growing out of Ingersoll's employment. The suit then was one to declare and foreclose a lien upon the property of the decedent distributable to the contestants. The syllabus of the case itself presents the distinction. It states that where the plaintiff is suing *primarily upon an obligation* to secure which a lien was given upon a distributive share of an heir's interest in an estate, it is not within the statute governing federal jurisdiction of suits by assignees of *choses in action*. In our case the plaintiffs are suing upon and by virtue of the assignment itself. The suit is not to declare and enforce a lien upon a distributive share of an estate.

Indeed, it would seem sufficient to say that the trust fund is not the distributive share of an estate in any other sense than that its origin was the estate of the decedent, Conrad Braker, Jr. The estate itself has been long since distributed.

The trust fund is held by the trustee solely for the benefit of the *cestui que trust* and his assigns.

THE CASES CITED BY APPELLANTS IN THEIR BRIEF (Deschler vs. Dodge; Bushnell vs. Kennedy; Ambler vs. Eppinger; Bertha Zinc & Mineral Co. vs. Vaughan) HAVE NO APPLICATION WHATEVER TO THE CAUSE BEFORE THE COURT IF INVOKED TO SHOW THAT THEY COULD MAINTAIN THIS ACTION IN THE DISTRICT COURT.

Each of these cases has to do with tortious causes of actions assigned over to suitors which were declared to be not within the statute. Deschler vs. Dodge was an action in replevin. Bushnell vs. Kennedy seems to have been for money wrongfully obtained from an agent entrusted with it. Ambler vs. Eppinger (137 U. S., 480; 34 l. e., 765) was an action for damages on account of a trespass. Bertha Zinc and Mineral Co. vs. Vaughan was an action against administrators and their sureties for a *devistavit*. Justice Field, in the case of Ambler vs. Eppinger, showed that the exception in the statute did not extend to suits growing out of some tortious act.

See to same effect

Mex. Nat. R. Co. vs. Davidson, 157 U. S., 201; 39 l. e. 672-674.

ALTHOUGH THE COMPLAINANTS SUE AS EXECUTORS, THEY ARE NONE THE LESS TO BE REGARDED ASSIGNEES OF THE DEED OF ASSIGNMENT MADE BY CONRAD MORRIS BRAKER.

The complainants seek to save themselves by invoking the case of Chappedelaine vs. Deschenaux, 4 Cranch, 306, and other such cases wherein it is asserted that assignees "*by operation of law*," as administrators or executors, who have taken up the burthen of decedents' estates, are not within the statute in question. It is enough to say in opposition that they are, notwithstanding their assertion, assignees by their own contract of assignment. They are not passive agents; they are *actors* so far as concerns their conduct and relations with the New York Finance Company. By the very instrument on which they base their title (Exhibit "E," pages 30-34), it will be seen, that they, as executors, received this deed of assignment from the New York Finance Company; *that on entirely new consideration* passed between them and that accounts were stated between them relating not only to the matter of the assignment made by Conrad Morris Braker, but to another loan made to their decedent.

Respectfully submitted,

WILLIAM P. S. MELVIN,
Solicitor for Defendant,
Austin B. Fletcher,
as Trustee, etc.
SAFFORD A. CRUMMEY,
Solicitor for Defendant,
Conrad Morris Braker.

No. 455 October Term, 1914

Supreme Court of the United States

PROVIDENT LIFE AND TRUST COMPANY and CATHARINE STEWART WOOD, Executors of the Estate of William Brewster Wood, deceased,

Appellants,

vs.

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and CONRAD MORRIS BRAKER,

Appellees.

BRIEF ON APPEAL.

WILLIAM P. S. MELVIN,
Solicitor for Defendant
Austin B. Fletcher, as Trustee, etc., Appellee.

SAFFORD A. CRUMMEY,
Solicitor for Conrad Morris Braker,
Appellee.

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BRIEF ON PART OF APPELLEES.

Statement.

This is a suit in equity brought by the plaintiffs in the District Court of the United States for the Southern District of New York to obtain a judgment that they be declared entitled to the immediate possession of Twenty thousand Dollars ($20,000.00) payable under the "Sixteenth" paragraph of the last will and testament of Conrad

Braker, Jr., deceased, and that the Court order and direct the defendant Austin B. Fletcher, as testamentary trustee under said will to pay to the plaintiffs said Twenty thousand Dollars ($20,000) (Record, pages 9, 10). The sum is part of a trust fund established by the testator in favor of his son, the defendant, Conrad Morris Braker. The trustee named in the will to administer the trust fund having resigned, the defendant, Austin B. Fletcher, was appointed in his stead by the Surrogate's Court of the County of New York to execute the unexecuted trusts under the will, one of which trusts (so far as relates to this action) concerns the administration of the trusts created under its "Fifteenth" and "Sixteenth" paragraphs.

The will was admited to probate on the 13th day of September, 1890.

Under its 15th paragraph the testator established a trust fund of $50,000.00, of which his son, the *cestui que trust*, was to have the use until he should attain the age of fifty-five years, which event would occur on the 25th day of February, 1913, and that thereupon he should receive the principal of the trust fund.

Under the 16th paragraph of the will a trust fund was established of the rest, residue and remainder of testator's property. This also was in favor of the same son and by it he was likewise to have the use thereof until he should attain the age of fifty-five years when he should be paid the principal.

On the 25th day of February, 1902, the *cestui que trust*, Conrad Morris Braker, made a deed of assignment in writing to the New York Finance Company, a New York corporation, of all his es-

tate, right, title and interest to the amount or extent of Thirty-five thousand Dollars ($35,000.00) and no more in and to the legacy of $50,000.00, and, also, in the legacy of the part or share of the residuary estate to which he was entitled under the "Fifteenth" and "Sixteenth" paragraphs respectively of said will, subject to the payment of seven-tenths of the legacy of $50,000.00 under the "Fifteenth" paragraph of the will which had theretofore been assigned by the *cestui que trust* to one Frank L. Rabe, amounting to $35,000.00.

This deed of assignment was drawn with formality and was under seal, was witnessed and acknowledged, and purports to have been recorded in the offices of the Register and Surrogates of the County of New York (Ex. B, pages 20-25).

A few months after the execution of this assignment, namely, on March 5th, 1902, the assignee, the New York Finance Company, gave its promissory note to William Brewster Wood for $15,000, payable July 5th, 1908. A renewal or substituted promissory note was made on July 5, 1903. These notes were for $15,000.00 and as collateral security for the payment of the same, there was pledged all the right, title and interest of the Finance Company in and to the estate of Conrad Braker, Jr., deceased, as shown by the written assignment thereof of the same date. The note of July 5, 1903, and the deed of assignment given as security are (Exs. "C" and "D," pages 25-29).

Exhibit D recites that Braker had assigned to the Finance Company all his interest to the extent of $20,000 in the legacy coming to him under the "Sixteenth" paragraph of the will.

On April 24, 1905, the assignee, William Brew-

ster Wood, died, and Letters Testamentary were issued to his widow and the Provident Life and Trust Company, the plaintiffs.

On May 14, 1912, the New York Finance Company sold, assigned, transferred and set over unto Catharine Stewart Wood and the Provident Life and Trust Company of Philadelphia, executors of the will of William Brewster Wood, deceased, all the equity of redemption, right, title and interest whatsoever which said Finance Company had or might or could have in and to an interest in the estate of Conrad Braker, Jr., assigned by it to William Brewster Wood as collateral security for a debt of Fifteen thousand Dollars and interest (Ex. "E," pages 30-34).

The recitals in Exhibit "E" indicate that interest, running on the said note, was claimed from January 5, 1907, and that interest was thereupon calculated, not only for what was then due, but, besides, down to the time that Braker, the *cestui que trust* would be fifty-five years of age; then interest was cast upon another debt of the said Finance Company to the estate of William Brewster Wood, not connected in any way, seemingly, with the above note, and the said Company thereupon agreed that if the said estate gave it a credit of One Hundred Dollars upon the latter indebtedness, it would sell to the executors of the estate of William Brewster Wood any equity it might possibly have in the interest assigned by it to said William Brewster Wood in the state of Conrad Braker, Jr.

The right of action asserted by the plaintiffs is based upon the said assignments "B," "D" and "E," and they claim (par. "Fourteenth" of Bill,

page 8) that by the original assignment (Ex. "B") and the *mesne* assignments, an absolute title was vested in them to the Twenty Thousand Dollars payable under the "Sixteenth" paragraph of the will of Conrad Braker, Jr.

On the day when Conrad Morris Braker became fifty-five years of age (February 25, 1913), this suit was instituted by the plaintiffs. The defendants answered separately and each plead that upon the face of the bill the District Court had not cognizance of the suit (pages 36, 53).

On March 27, 1914, motions were made in the District Court, on the part of each defendant, for a decretal order dismissing the suit with costs on the ground that the Court had not cognizance of the same (pages 66, 67).

The motions to dismiss the suits were granted, and thereupon an order was made by the Court, dismissing the suit with costs on the ground that the District Court had no cognizance of the same, inasmuch as the suit could not be prosecuted in the court if no assignment had been made (page 68).

The plaintiffs then petitioned for an allowance of an appeal to the Supreme Court of the United States, under the provisions of section 238 of the Judicial Code, which, being allowed, the Court certified that the dismissal of the bill was solely on the ground that no jurisdiction of the District Court existed; that the determination was on the ground that one of the defendants was the assignor of an interest in a decedent estate, which interest was assigned to the complainants, and that the defendant assignor is a citizen of the same state as his co-defendant (page 70).

Argument.

The bill of complaint of the plaintiffs herein was dismissed by the District Court on the ground solely that this was a suit to recover upon a chose in action in favor of an assignee, and that the suit could not be prosecuted in such court to recover upon the chose in action if no assignment had been made.

The suit is brought by persons who by *mesne* assignments from the original assignee, have become possessed of a part of the vested interest of a *cestui que trust* in a testamentary trust fund held by his trustee for his benefit until he should attain the age of fifty-five years, and which was then to be paid over to him by the trustee. The trustee is the defendant, Austin B. Fletcher. The *cestui que trust* is the defendant, Conrad Morris Braker, and the bill of complaint shows that both trustee and *cestui que trust* are citizens of the State of New York.

POINT I.

The present statute fixing the jurisdiction of District Courts is unqualified in its expression that they cannot take cognizance of a suit to recover upon a CHOSE IN ACTION in favor of any assignee unless such suit might have been prosecuted in the court if no assignment had been made.

The following is the text of the Judicial Code so far as it affects the question now before the court:

"No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

Sec. 24 Judicial Code, First Subdiv.

This law limiting the jurisdiction of the lower courts was first announced by Congress in Section 11 of the Judiciary Act of 1789 (Stat. at Large 78, ch. 20) as follows:

"Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless such suit might have been prosecuted in such court to recover the said contents if no assignment had been made."

This statute was reenacted in Section 629 of the Revised Statutes with slight modification, as follows:

"The Circuit Courts shall have original jurisdiction as follows:

FIRST.—Of all suits of a civil nature at common law or in equity * * * Provided that no Circuit Court shall have cognizance of any suit to recover the contents of any promissory

note or other chose of action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

Thus the law remained until 1875 when it was changed to read as follows:

"Nor shall any Circuit or District Court have cognizance of any suit founded on a contract in favor of an assignee unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant and bills of exchange."

But the Act of 1875 was amended and the law restored to practically the form in which it originally stood in 1789. This last amendment was made by the Acts of March 3, 1887, and of August 13, 1888, and is as follows:

"Nor shall any Circuit or District Court have cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note, or other chose in action, in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

It will be observed that the changes now made in the law by the Judicial Code are rather in its

structure than in its substance, except in one particular which does not so much affect the question before the court, as it serves perhaps to indicate that by the omission of the word "*contents*" (a word that had appeared in the law from the very beginning), Congress purposed to remove the limitations that by its use in aid of construction the court had placed upon the term "*chose in action.*" The limitation being removed the broadest interpretation to the term should now be given, with the result that many more cases are now excluded from cognizance by the District Court.

Chief Justice Marshall said in 1808, in Sire vs. Pitot (6 Cr., 335), commenting on the term "chose in action," that the word "contents" was too ambiguous in its import to restrain that general term; nevertheless, it will appear that the court, in its subsequent history, has been controlled in its decisions by the association of the word "contents" with that term.

Thus in Corbin vs. Black Hawk Co. (105 U. S., 659, 26 L. e., 1136), a cause which originated in 1874, Judge Blatchford said:

> "The *contents* of a contract as a *chose in action* in the sense of Sec. 629 are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such *contents*. The promise to pay money contained in a promissory note is all that there is of the note. A suit to enforce the payment of the money is a suit to recover the *contents* of the note, be-

> cause there is nothing contained in the note but the promise."

Again, it was held in Shoecraft vs. Bloxham (124 U. S., 730, 31 l. e., 574) that a suit to enforce the performance of a contract is a suit to recover *the contents of a chose in action*. The court said:

> "The terms used, 'the contents of any promissory note or other chose in action,' were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning but they have received a construction substantially to that purport in repeated decisions of this court. They were so construed in the recent case of Corbin vs. Black Hawk County, 105 U. S., 659 (26:1136) where the subject is fully considered and the decisions cited."

Reference has been made by the appellants to the cases of Deshler vs. Dodge, 1853, (16 How, 622); Bushnell vs. Kennedy, 1870, (9 Wall., 387); Ambler vs. Eppinger (137 U. S., 480); and Bertha Zinc and Mineral Company vs. Vaughan (88 Fed., 566) as in some way sustaining their contention here that the assignment is such a *chose in action* as may be maintained in the District Court notwithstanding the fact of the citizenship of the original assignor being the same as the trustee. But an inspection of all these cases will show that they were all founded on assignments of tortious claims, and the courts held that such claims were not within the restrictions of the statute because they

did not have *"contents"*—the plain inference being that without such word the court would have given the term "chose in action" its full import and denied the jurisdiction of the lower court.

Judge Nelson said in Deshler vs. Dodge (supra):

> "We are of the opinion that this clause of the statute has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention, and that it only applies to cases in which the suit is brought to recover the *contents*, or to enforce the contract contained in the instrument assigned."

POINT II.

The Supreme Court early defined what is a "chose in action," as the term is used in the statute, and the term has a familiar meaning in our law literature and decisions.

The Supreme Court has itself given us a definition of what is a *chose in action*. In Sheldon vs. Sill., (49 U. S., 441, 12 l. e., 1147, 1151), Judge Grier says:

> "The term 'chose in action' is one of comprehensive import. It includes all the infinite varieties of contracts, covenants and promises which confer on one party a right to recover a personal chattel or a sum of money by action."

In Bushnell vs. Kennedy (9 Wall., 387, 19 l. e., 738) Chief Justice Chase says, regarding the term:

> "Under that comprehensive description are included all debts and all claims for damages for breach of contract, or for torts connected with contracts."

A *chose in action* is said to be a thing not in occupation or enjoyment, but merely a bare right to be recovered by an action; hence its name.

U. S. vs. Moulton, 27 Fed. Cas., 11, 12.

An assignment of an interest in a testamentary trust fund is characterized as an assignment of a *chose in action.*

Mercantile Trust Co. vs. Gumbernat, 143 N. Y. App. Div., 308.

Under the head "Chose"—"Choses in action," Bouvier in his law dictionary gives as definition:

> "Personal things of which the owner has not the possession, but merely a right of action for their possession."

And he refers to 2 Blacks. Comm., 389, 397. In Blackstone we read:

> "Property in chattels personal may be either in possession, which is where a man hath not only the right to enjoy but hath the actual enjoyment of the thing; or else it is in action where a man hath only a bare right without any occupation or enjoyment."

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Again he says:

> "We will proceed next to take a short view of the nature of property in *action*, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question, the possession whereof may, however, be recovered by a suit or action at law; from whence the thing so recoverable is called a thing or *chose in action*."

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A *chose in action* includes all rights to personal property not in possession, which may be enforced by action.

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"It is a right of proceeding in a court of law to procure the payment of a sum of money. The term is used in contradistinction to choses in possession, which are chattels, of which one is in possession or control, such as corn, wheat, books and the like.

"One view has restricted the term to rights of action for money arising under contract, but while it comprehends these, whatever the contract, it is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a wrong inflicted either upon the person or property." Citing Gillett vs. Fairchild, supra; McKee vs. Judd, 12 N. Y., 622; Williams Per. Prop., 4.

3 Am. & Eng. Ency., 1st ed. Sub Tit. "Choses in Action," 236.

Pertinent, too, is the opinion of the Circuit Court of Appeals in Brown vs. Fletcher (206 Fed. Rep., 461), a case very similar in its character to that now before the court. It is a suit between the same complainants and this defendant-trustee to recover upon the assignment made by the same *cestui que trust* of another trust fund created under the same will. In that case the objection was raised, as now, to the court's jurisdiction.

Judge Learned Hand of the U. S. District Court, in overruling the demurrer to the jurisdiction, conceded, in his opinion, upon the question whether the interest of the *cestui que trust* in the sum of money held for him by the trustee was a *chose in action* under Section 24 of the Judiciary Act, that

such was, no doubt, the case in "strict legal theory," but he said that he did not think the cestui que trust's interest was what the statute meant by a *chose in action*. The cause went to hearing resulting in a decision on the merits in favor of the defendant. An appeal was taken to the Circuit Court of Appeals, and again it was objected by the defendant that the lower court did not have jurisdiction, and the Appellate Court dismissed the suit upon that and other grounds.

The cause is now pending in this court upon a writ of certiorari.

The Circuit Court of Appeals said in the case (206 Fed. Rep., 461) with reference to the assignment:

> "This is clearly a *chose in action*, that is, a claim not in possession but which must be enforced by an action against the trustee. Sheldon vs. Sill (49 U. S., 441). As their assignors could not maintain an action in the District Court, the complainants cannot."

POINT III.

Equitable assignments of CHOSES IN ACTION, as well as legal assignments, are comprehended within the application of the statute.

The assignment by Conrad Morris Braker, the *cestui que trust*, on April 18, 1901, of seven-tenths of his interest in the trust fund held by his trustee, Austin B. Fletcher, was an equitable assignment.

Chief Justice Marshall said in Sire vs. Pitot (6 Cranch, 333):

> "The words of the act are said to apply obviously to assignments made by the party himself on an actual note, or other chose in action assignable by the proprietor thereof * * * without doubt assignable paper being the chose in action most usually transferred was in the minds of the legislature when the law was framed; and the words of the provision are therefore best adapted to that class of assignments. But there is no reason to believe that the legislature was not equally disposed to except from the jurisdiction of the federal courts those who could sue in virtue of equitable assignments and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant might, under certain circumstances, be permitted to sue in equity in his own name, and there would be as much reason to exclude him from the federal courts as to exclude the same person when the assignee of a particular note."

The foregoing case was referred to in Corbin vs. Black Hawk County (105 U. S., 659, 26 L. e., 1136) as one by which the principle was settled that the statute intended to except suits in virtue of equitable assignments, as well as suits by virtue of legal assignments.

POINT IV.

The assumption of the appellants that the opinion of the court in Ingersoll vs. Coram is determinative as to the jurisdictional question in this suit is erroneous.

The endeavor is made to show that the expression of the Court in Ingersoll vs. Coram (211 U. S.,

335, 53 l. ed., 208) is adverse to the defendants' contention in the present case, but the circumstances are totally different. In that case a bargain was made by would-be contestants for the employment of the legal services of Col. "Bob" Ingersoll, and his payment was to be made out of the amount that might be secured thereby. The matter involved the setting aside of the last will of Andrew J. Davis, a very wealthy man, and as a result of the suit instituted Ingersoll was successful in bringing about a compromise, and it was claimed that an equitable lien attached to the distributive shares so secured for the contestants, and that the suit by Ingersoll's widow and administratrix to have the Court declare and foreclose such lien on the distributive shares was, because it was based on the contract of employment, a suit within the statute governing federal jurisdiction of suits by assignees of choses in action. Justice McKenna said it was certainly very disputable if an interest in a distributive share of an estate is within the statute, and the inference is now begged that this Court will look upon the assignment made by Conrad Morris Braker of his interest in the trust fund held for his benefit by Austin B. Fletcher growing out of the estate of Conrad Braker, Jr., as an interest in a distributive share of an estate.

But the testamentary trust fund held by the defendant, Austin B. Fletcher, is not the distributive share of an estate of a decedent. True, it is a part of the estate of the testator, Braker. He founded the trust fund, but long before the execution of the assignments the fund was severed from the testator's estate by the act of his executors paying it into the hands of the trustee for the benefit of the

cestui que trust named in the will, and, eventually it was paid into Mr. Fletcher's hands, as trustee, under order of the court (par. 4, 5, 6 of bill). Unquestionably the *cestui que trust* could dispose of his equitable interest in the principal of the trust fund while it was being administered, and with the same positiveness it may be asserted that the purchaser of such an interest could enforce its payment to him by the trustee when the day arrived for its payment. But such an interest by a *cestui que trust* in a trust fund is quite a different one from that of an heir-at-law or next of kin in the estate of his ancestor. The interest of a *cestui que trust* in a testamentary trust fund is positive and fixed, but that of an heir or next of kin in an estate in the hands of an administrator or executor may be very vague and uncertain, subject to the discovery and payments of claims of creditors and the expenses of administration, and in this view it might be a doubtful matter whether the rights of an heir or next of kin is a chose in action.

In our case the estate of Conrad Braker, Jr., has been long since distributed; the executors of the estate have paid into the hands of the testamentary trustee the entire trust fund established by the will of the decedent, and no person other than the *cestui que trust* or his assignees have, so far as relates to the fund, any concern in its management and distribution. It is an interest capable of being assigned, and the assignees now, by their bill of complaint, ask that the Court will decree the payment over to them by the trustees of the assignee's part of the fund.

The assignment is of a *chose in action*, and the citizenship of the assignor precludes the lower court from taking cognizance of the suit.

POINT V.

This suit is founded upon an assignment IN FACT made to the plaintiffs as distinguished from an assignment to them by OPERATION OF LAW.

It will be seen by the eleventh paragraph of the bill (6) that the New York Finance Company, on the 5th day of March, 1902, assigned to William Brewster Wood, the plaintiffs' testator, as collateral security for the payment of its promissory note of the same date all its interest of whatever kind in the sixteenth paragraph of the will of Conrad Braker, Jr.—and by the twelfth paragraph of the bill (7) that ten years afterwards the said Finance Company sold and assigned absolutely all such interests to the plaintiffs, the executors of said William Brewster Wood.

Up to the time of the execution of this last-named assignment the said Finance Company had a right to redeem the pledge made by it of its interests referred to in said promissory note and accompanying assignment (Exhibits "C" and "D"). This note and assignment are to be read together. They are parts of the same transaction. The note provides what should be done by its holder upon a default in its payment, and the proceedings there outlined, unless afterwards changed, should have been carefully observed; however, such proceedings were obviated by an entirely new method adopted by the interested parties (Exhibit "E." 30-34). It will be seen that they first ascertained the amount due upon the promissory note; then an account was stated as to the amount of the indebtedness of the Finance Company to the said executors upon another and totally different obliga-

tion, foreign to this record, and, thereupon, a bargain was struck that in consideration of the Finance Company being given a credit of one hundred dollars upon the interest due on this last-named obligation, it would sell to the executors of the estate of William Brewster Wood any interest whatsoever it then had or might or could have in the described interest of twenty thousand dollars in the estate of Conrad Braker, Jr., deceased, so assigned by it to William Brewster Wood as collateral security for the debt of fifteen thousand dollars and interest under the promissory note.

The complainants seek to save themselves by invoking the case of Chappedelaine vs. Deschenaux, 4 Cranch, 306, and other such cases wherein it is asserted that assignees "by operation of law," as administrators or executors, who have taken up the burden of decedents' estates, are not within the statute in question. It is enough to say in opposition that they are, notwithstanding their assertion, assignees by their own contract of assignment. They are not passive agents; they are actors so far as concerns their conduct and relations with the New York Finance Company. By the very instrument on which they base their title (Exhibit "E," pages 30-34), it will be seen, that they, as executors, received this deed of assignment from the New York Finance Company; that an entirely new consideration passed between them, and that accounts were stated between them relating not only to the matter of the assignment made by Conrad Morris Braker, but to another loan made to their decedent.

By the brief of appellants now submitted, they seek to minimize the effect of the assignment (Exhibit "E") made to them on May 14, 1912, about seven years after their appointment as executors, and, in order to meet the assertion that it is not

as transferees by *operation of law* that they are suitors, but as transferees under an instrumentality of their own making, they now airily say that the fact that the New York Finance Company executed a "*release* to them" (as they now style the assignment) of its "*theoretical equity of redemption is wholly immaterial*," and they invite the Court to regard their averments in regard to it as "*surplusage*." To do so, then paragraph twelfth of the bill may be omitted. Omit that paragraph and the bill falls to pieces, but more important, for the feature of the controversy being considered, it shows the need of considering the instrument (Exhibit "E") by force of which they claim to have become absolutely entitled to $20,000.00 of the trust fund, and observing that its execution was brought about by a novel consideration moving from the executors, constituted it an entirely new transaction—an assignment *in fact*.

POINT VI.

The decretal order of the District Court of the United States for the Southern District of New York should be affirmed, with costs, to the respective appellees without prejudice to the right of the plaintiffs to bring any suit they may be advised in the proper court.

WILLIAM P. S. MELVIN,
Counsel for Appellee,
Austin B. Fletcher, as Trustee, etc.

SAFFORD A. CRUMMEY,
Counsel for Appellee,
Conrad Morris Braker.

15732

No. 455 October Term, 1913.

Supreme Court of the United States

PROVIDENT LIFE AND TRUST COMPANY and CATHARINE STEWART WOOD, Executors of the Estate of William Brewster Wood, deceased,

Appellants,

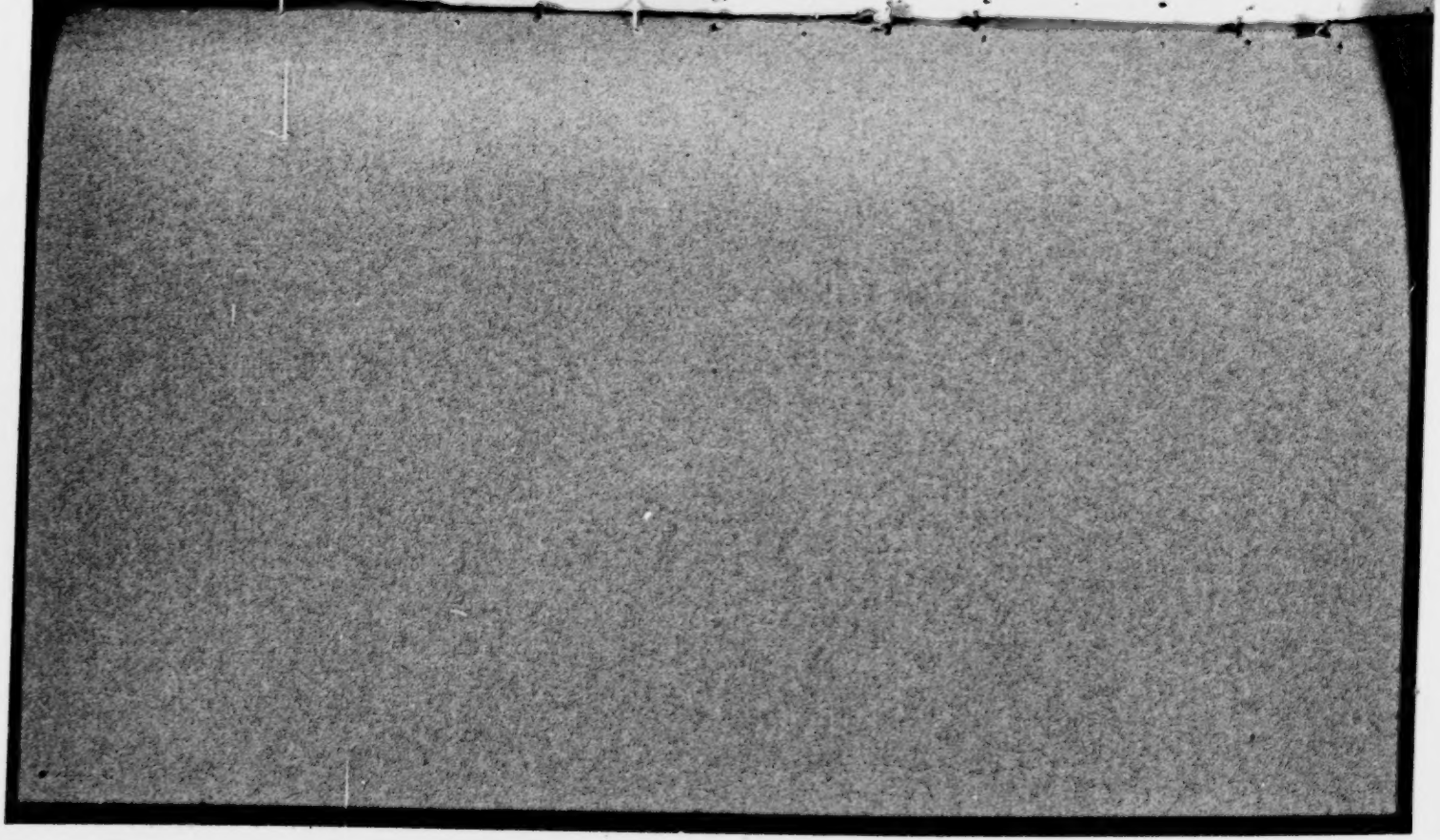
vs.

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and CONRAD MORRIS BRAKER,

Appellees.

SUPPLEMENTAL BRIEF ON PART OF AUSTIN B. FLETCHER, AS TRUSTEE, &c.

WILLIAM P. S. MELVIN,
Solicitor for Defendant
Austin B. Fletcher, Appellee.



Supreme Court of the United States

PROVIDENT LIFE AND TRUST COMPANY and CATHARINE STEWART WOOD, Executors of the Estate of William Brewster Wood, deceased,

Appellants,

vs.

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and CONRAD MORRIS BRAKER,

Appellees.

SUPPLEMENTAL BRIEF.

Counsel for appellee, Austin B. Fletcher, as trustee, etc., has no objection to this motion to advance the cause.

Counsel recognizes that under the rule of this Court (Rule 6) the motion to advance must be submitted in the first instance on printed briefs or arguments, but from authoritative information received at the office of the Clerk of the Court, it appears to be the uniform procedure of the Court that a motion to advance a cause draws with it simultaneously by the submission to the Court without oral argument, of the sole question at issue, as here, namely, whether the lower court had jurisdiction to take cognizance of the suit.

Counsel for appellee respectfully submits that should the court order the cause to be advanced, an oral argument thereof be directed. This course it seems would be consonant with the rule (22) allowing a certain time for oral argument in "cases involving solely the jurisdiction of the court below." Besides, reading sub-division 4 of Rule 6, and paraphrasing it, as we may, to make it suit conditions similar to those in the present case it would read as follows:

> 4. All motions to advance a case on the Docket, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject [i. e., the subject of the advancement of the cause], it will be ordered in connection with the *hearing* on the merits [i. e., on the oral argument or voluntary submission of the question as to whether or not the lower court could take cognizance of the suit].

Since, under Rule 22 the appellee is allowed a certain time for an oral argument in such a case as that now before the court, why should the rule

cease to be operative because the case has been advanced?

It is respectfully suggested in conclusion that the cause be transferred to a "summary docket" for hearing at as early a day as practicable during the next term of the Court.

WILLIAM P. S. MELVIN,
Counsel for Appellee,
Austin B. Fletcher, as trustee, etc.

No. 455. October Term, 1914.

IN THE

Supreme Court of the United States.

PROVIDENT LIFE AND TRUST COMPANY and CATHARINE STEWART WOOD, Executors of the Estate of William Brewster Wood, Deceased,

Appellants,

v.

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., Deceased, and CONRAD MORRIS BRAKER,

Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

MEMORANDA IN REPLY TO BRIEF OF APPELLANTS.

PERRY D. TRAFFORD,
H. GORDON McCOUCH,
Solicitors for Appellants.

International, 236 Chestnut St., Philadelphia.

IN THE

Supreme Court of the United States.

No. 455. October Term, 1914.

PROVIDENT LIFE AND TRUST COMPANY, AND CATHARINE STEWART WOOD, EXECUTORS OF THE ESTATE OF WILLIAM BREWSTER WOOD, DECEASED,

Appellants,

v.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER, UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND CONRAD MORRIS BRAKER,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FIRST: THE LANGUAGE OF SECTION 24 OF THE JUDICIAL CODE DID NOT ALTER THE EXISTING LAW.

It would seem that inasmuch as Mr. Chief Justice Marshall in Sere v. Pitot, 6 Cranch, 335, treated the word "contents" as not affecting the meaning of this provision, and as this decision has been always quoted in this Court with approval, the strongest possible direct evidence would be necessary to show that in codifying the laws of the United States into the Judicial Code an alteration of existing law was intended. But

in this case, the Journals of Congress afford us a complete demonstration of the fact that no change in existing law was intended.

When this clause was read, the Journal states:

"MR. NEWLANDS: I wish to make an inquiry of the Senator from Idaho. I observe that section 24 declares that——

> No district court shall have cognizance (except upon foreign bills of exchange) to recover *upon any* promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover *upon such note or other chose in action* if no assignment had been made.

I presume the purpose of that is to prevent an assignment from being made in order to give the United States court jurisdiction.

MR. HEYBURN: That is the existing law, and it is a necessary limitation upon the jurisdiction of any United States court. Having merged the jurisdiction of the district and circuit courts, it appears here in a different order from that in which it appears in existing law, but it is nevertheless a necessary provision.

MR. NEWLANDS: I would ask the Senator upon what theory he excepts foreign bills of exchange? Is it upon the theory that a foreign bill of exchange as it relates to interstate and foreign commerce would come within the jurisdiction of the national courts?

MR. HEYBURN: It always has been so. There is no change in the law suggested by that provision, and it has existed from the beginning and is a necessary provision. Should the Senator desire further consideration of it, we can go deeper into it; but if the Senator will just refer to the law writ-

ten opposite, taking part 2 of the report which is in the Senator's desk, he will find the existing law printed opposite that section, so that he will be enabled to know exactly what change, if any, has been made. As a matter of fact, in paragraph 1 the condition is best stated by the statement of the committee here:

> The jurisdiction of the circuit courts as to suits at common law, or on the ground of diverse citizenship, etc., is conferred by the first section of the act of August 13, 1888 (1 Supp., 433), the purpose of which was to correct the mistakes contained in an earlier act. In United States v. Sayward (160 U. S., 493, 498) the Supreme Court construed the language of that section, and proceeded to restate it in its own language. The committee in drafting this paragraph followed the language of the Supreme Court as construed in that case.

That is the note made by the committee, and it fully expresses the reason why we have carried that forward. We have used the exact language of the Supreme Court of the United States in stating the law, thus bringing up all controversies that may have existed before this time and crystallizing them into a section in the language of the decision itself.

Mr. Newlands: I have no objection whatever to the phraseology of this section. My attention was simply called to the term "foreign bill of exchange". I saw it was made an exception to the general rule declared in this section, and I have been contending that state banks engaged in interstate commerce and in foreign commerce were subject, like state railroads, to national control and direction with reference to safety devices that might be required in the interest of depositors. The contention has been made upon this floor that a bill of exchange was not regarded either as an instrument of interstate commerce or of foreign com-

merce, and I have been referred to a decision where an attempt was made by a State to impose a tax upon a broker who was engaged simply in selling foreign exchange, and who claimed that the tax upon that occupation was a burthen upon foreign commerce, and therefore could not be imposed by the State, where the tax was sustained. It has been contended that that case was conclusive that a bill of exchange was not an instrument either of interstate commerce or of foreign commerce.

I am glad to see that this section harmonizes with the view that I myself entertain, that it is a bill of exchange, either in interstate or foreign commerce, and is a matter that comes under the jurisdiction of the Nation instead of the States.

MR. HEYBURN: This limitation is intended to prevent the assignment of promissory notes and that class of paper to parties for the purpose of giving the federal court jurisdiction. That is all there is in it in the world. Foreign bills of exchange were excepted because of necessity, from the very nature of the transaction, it would not do to exclude them because they had been assigned. But this is intended to relieve the United States court from consideration of actions brought to recover on promissory notes that have been assigned for the purpose, or in order that they might come within the jurisdiction of the United States courts on the question of diverse citizenship. It has no other application or purpose. But, as I have said, it would not do to apply under that rule to foreign bills of exchange, because they come here already assigned. Foreign bills of exchange, from the very nature of the transaction, must be excepted from that rule, and that is all there is in that proposition.

MR. SUTHERLAND: I do not want to assent to any such proposition as the Senator from Nevada (Mr. Newlands) makes about this provision of the law. The court is not given jurisdiction over this matter because

it is a subject-matter of interstate commerce, but it is given jurisdiction upon the ground that there is diversity of citizenship.

The existing law has made certain exceptions, and I submit to the Senator from Nevada that this committee ought not to be called upon to defend the provisions of existing law. If they are unwise, the burden should be upon those who attack them. The committee inserted the law as it found it, and it will take sufficient of the time of the committee, if they are called upon to defend the changes which they made, without defending the provisions of existing law. In other words, if any Senator upon the floor thinks that existing law is not right, the burden should be upon him to point out where it is not right, and not call upon this committee to defend provisions of existing law.

MR. HEYBURN: I think that is an admirable statement of the case. The Revision Committee was not appointed for the purpose of substituting some legislation for existing law, but only for the purpose of codifying, revising, eliminating, and harmonizing, but always respecting the text and the principle involved in existing law.

MR. NEWLANDS: The Senator is not called upon to make any defense, because I have made no attack. All I wished an explanation."

SECOND: THE PHRASE "CHOSE IN ACTION" AS USED AT THE TIME OF THE ADOPTION OF THE JUDICIARY ACT OF 1789, DID NOT INCLUDE AN INTEREST OF A *CESTUI QUE TRUST* IN AN EXECUTORY LIMITATION.

Counsel for appellee have collected certain definitions of the term "chose in action". These definitions are, however, collected without reference to historical continuity and are not in some instances so fully stated as to convey the full meaning of the authority.

It is true that in Bouvier's Law Dictionary the term "choses in action" under the head "chose" is defined as "personal things of which the owner has not the possession, but merely a right of action for their possession", citing Blackstone's Commentaries. But it is far more important to observe that under the heading "chose in action" the same dictionary thus defines the term at length: "A right to receive or recover a debt or money for damage for breach of contract or for a tort connected with contract but which cannot be enforced without contract", citing Comyn's Digest, under the title of "biens".

In examining Comyn's Digest and Blackstone's Commentaries, we are within the 18th century itself, and it is therefore interesting to find that Comyn, enumerating those things which cannot be assigned at common law, separated them into three heads:

A. Choses in action.
B. Bare rights.
C. Possibilities.

In the third subdivision Comyn puts the right of A in a future estate for years arising after a life estate, where the ultimate possession was dependent upon A's outliving the life tenant. Vol. 1, Comyn, title "Assignment", pages 696-697.

Counsel for the appellee give two quotations from Blackstone, on pages 12 and 13 of their brief, but they neglect to quote the conclusion, as follows: "Hence it may be collected, that all property in action depends entirely upon contracts, either express or implied; which are the only regular means of acquiring a chose in action". Book 2, chapter 25, page 396. It is in view of this 18th century use of the term "chose in action" that Mr. Justice Grier in Sheldon v. Sill, 49 U. S. 441, defined the term "chose in action" by saying: "It includes all the infinite varieties of contracts, covenants

and promises which confer on one party a right to recover a personal chattel or a sum of money by action".

Later, over seventy years after the Judiciary Act of 1789, in Bushnell v. Kennedy, Mr. Chief Justice Chase said, as quoted by counsel for appellee, "Under that comprehensive description are included all debts and all claims for damages for breach of contract, or for torts connected with contract". In that case the jurisdiction of the Circuit Court was sustained, and this Court regarded the use of the phrase "chose in action" in the Judiciary Act as being less comprehensive than the existing use of the term.

But nowhere, unless perhaps in some recent State Court decisions where the point has not been argued, is the phrase "chose in action" applied to an interest in a decedent's estate or to an executory interest of a cestui que trust. Certainly there is no decision of any United States Court to that effect until the decision of the Circuit Court of Appeals for the Second Circuit in Brown v. Fletcher, 206 Fed. 461, now before this Court on certiorari.

THIRD: INGERSOLL V. CORAM CANNOT BE DISTINGUISHED FROM THE CASE AT BAR.

The attempt to distinguish this case is on the ground that in Ingersoll v. Coram, the Court had to deal with an undivided interest in a decedent's estate, and that in the case at bar we have the interest of a cestui que trust in a trust fund. And it is argued that, whereas an undivided interest in a decedent's estate is not a chose in action, an interest in an executory limitation is a chose in action.

The fundamental objection to this reasoning is that chose in action in the Judiciary Act of 1789 given its widest meaning was applicable only to the right to recover a debt or damages for breach of contract or for a tort connected with contract, and had nothing what-

ever to do with a decedent's estate where the rights are not created by contract at all. An interest in a trust estate is no more a right growing out of contract than is an undivided interest in a decedent's estate.

If the term "chose in action" were applicable to either, it would be far more applicable to an undetermined share in a decedent's estate than it would be to what, as in the case at bar, rises to the dignity of an equitable estate.

An equitable estate is not a "chose in action" because the legal title is vested in a trustee.

FOURTH: THE BILL IS MAINTAINABLE ENTIRELY APART FROM THE AVERMENTS CONTAINED IN PARAGRAPH TWELVE OF THE BILL OF COMPLAINT.

The twelfth paragraph of the bill of complaint recites the absolute release and assignment of $20,000 by the New York Finance Company to the appellants. The preceding part of the Bill shows that they hold this assignment of $20,000 as collateral security for an amount of principal and interest exceeding $20,000. There can be no doubt that the appellants were and are entitled to maintain their action as collateral holders, entirely independent of the release and to receive exactly the same remedy, namely, the declaration that they are vested with the title to receive the $20,000.

PERRY D. TRAFFORD,
H. GORDON McCOUCH,
Solicitors for Appellants.